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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~899~~. 299

JOSEPH H. OGLESBY AND JULES CASSARD,
PLAINTIFFS IN ERROR,

vs.

HENRY Y. ATRILL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 7, 1879.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA.

United States Circuit Court for the Fifth Circuit and District of Louisiana.

HENRY Y. ATRILL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD. } No. 7,435.

Transcript.—Filed June 5th, 1875.

STATE OF LOUISIANA.

Fourth District Court for the Parish of Orleans.

HENRY Y. ATRILL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD. } No. 43,501.

Petition.—Filed April 12th, 1875.

To the hon. the Fourth District Court for the Parish of Orleans.

The petition of Henry Y. Atrill, who resides in the city of Baltimore, in the State of Maryland, with respect represents—

2 That having become sole owner of all the capital stock of the Crescent City Gas-Light Company, a corporation created by a special act of the general assembly, being act No. 97, entitled "An act to incorporate the Crescent City Gas-Light Company," approved April 20th, 1870, and also by act amendatory of said act 97, approved 10th July, 1873, he was sole owner of said stock, amounting to three million dollars, divided into thirty thousand shares of one hundred dollars each, in the month of March, 1875, entered into negotiations with the New Orleans Gas-Light Company, a corporation created under the laws of the State of Louisiana, for an amalgamation of the said Crescent City Gas-Light Company with the said New Orleans Gas Company, in pursuance of the provisions of act No. 157, approved 12th December, 1874, entitled "An act to authorize the consolidation of business or companies." That said negotiations resulted in an agreement

3 for amalgamation, entered into in the month of March, 1875, between the companies aforesaid through their respective boards of directors, who thereupon convened meetings of their respective stockholders, to be held on 9th April, 1875, to assent to said agreement of consolidation or amalgamation; and on said day said meetings were held and the requisited number of stockholders of each company, holding and owning more than three-fifths of the capital stock of their respective companies, gave their formal assent to said agreement of consolidation on said 9th April, 1875, and on the ensuing day said agreement was deposited with the secretary of state, as required by law. Petitioner avers that under the terms of said agreement of consolidation, the con-

solidated company retained the name of the New Orleans Gas-Light Company, and the full-paid capital stock of said consolidated company was fixed at three million seven hundred and fifty thousand dollars, divided into thirty-seven thousand five hundred shares of one hundred dollars each, and twelve thousand
4 five hundred of said shares were allotted to your petitioner as owner of the capital stock of the Crescent City Gas-Light Company, and the residue, twenty-five thousand shares, were allotted to the owners of stock in the New Orleans Gas-Light Company.

Petitioner avers that at 2 o'clock, P. M., on 10th April, 1875, and about the time of the final consummation of the agreement of consolidation, and with the view and object to interpose obstacles in the way of your petitioner realizing the benefits and advantages of said consolidation, the defendants, Joseph H. Oglesby and Jules Cassard, the former representing himself as entitled to three thousand five hundred and fifty shares of stock in the present gas-light company, and the latter to eleven hundred and fifty shares of the same stock, united with Joseph Hernandez in a letter or notice addressed to James Jackson, president, and the directors of
5 the New Orleans Gas-Light Company, in words and figures following, viz.:

"NEW ORLEANS, *April 10th*, 1875.

"JAMES JACKSON, President Gas Company.

"By the newspapers we noticed that you are about to make an 'adjustment of your contest with the Crescent City Gas Company. 'We, the undersigned, hereby notify you that at the commence-'ment of the litigation with your company we were the owners of 'the shares in the Crescent City Gas Company attached to our un-'dersigned names; that we were defrauded of said stock by the 'fraud and machinations of the officers of the said company, and 'that we intend to prosecute our claim to the same and hereby 'notify you that any compromise or adjustment you may make 'with said Crescent City Gas Company will be subject to our rights 'to the extent above stated, and that legal proceedings will be insti-'tuted to enforce our said rights.

6 "(Signed) J. H. OGLESBY, 3,550 shares.
"(Do.) JULES CASSARD, 1,150 do.
"(Do.) J. HERNANDEZ, 400 ".

Petitioner avers that the said defendants were apprised some time before the date of said negotiation for consolidation and on purpose delayed giving the notice aforesaid, with the view of injuring and embarrassing petitioner in the exercise and enjoyment of his rights under the agreement of consolidation just made but not perfected by deposit in the office of the secretary of state or carried into effect by the delivery of stock.

Petitioner avers that the claim set up by the defendants in the said written notice is utterly groundless in law and in fact, and under no state of circumstances could the defendants have maintained an action against the New Orleans Gas-Light Company, and hence petitioner avers that the notification contained in said letter was concoted by the defendants with the sole view of injuring
7 your petitioner and depreciating his stock in the consolidated company.

Petitioner avers that on 7th April, 1873, the board of directors of the Crescent City Gas-Light Company, as they had a right to do, levied an assessment of one and one-half per cent. on the stock of said company held by the respective stockholders, and under said assessment the defendant Oglesby was bound to pay six thousand and seventy-five dollars as owner of four thousand and fifty shares, and the defendant Cassard was *was* bound to pay seventeen hundred and twenty-five dollars as owner of eleven hundred and fifty shares; that when called on said defendants refused to pay said assessment, and on 6th May, 1873, instituted suit in conjunction with W. S. Pike, Samuel Smith & Co., Livingston, Fox & Co., and J. Hernandez, to enjoin the board of directors from proceeding to enforce the payment of said assessment, and in said injunc-
8 tion suit they set up "frauds and machinations of the officers of said company," all of which will appear by reference to the suit of Joseph H. Oglesby and others, No. 3,116, in the Superior District Court for the Parish of Orleans. That thereupon, on the 14th May, 1873, the said Crescent City Gas-Light Company brought suit in said superior district court against said Oglesby and Cassard to enforce payment of said assessment, as appears by suits Nos. 3,509 and 3,505 on the docket of said court; that on the 15th May, 1873, the defendant Cassard transferred his stock to F. A. Phipps, and on 22d May, 1873, the defendant Oglesby transferred 3,550 shares of his stock to said Phipps and disposed of the residue of his stock; that said transfers were made in consequence of an intimation from the court that the injunction suit aforesaid could not be maintained, and across the face of said transfer by said
9 Oglesby to said Phipps is written in the following stipulation at his instance: "The Crescent City Gas-Light Com-'pany accepts and assents to the transfer of 3,550 shares of stock in 'said company, made by Jos. H. Oglesby, upon which only fifty 'cents per share has been paid, and releases him from all past, 'present, and future assessments that are made or may be made on 'said stock, and accepts in place of said Oglesby 'for all such payments, past and present liability." That a similar endorsement was written across the face of the transfer of said Cassard, under date 15th May, 1873, and thereupon, on the 16th May, 1873, the suit against said Cassard for his assessment was dismissed, and at a subsequent date the suit against said Oglesby was dismissed, and on 4th June, 1873, said Oglesby and Cassard dis-

missed their injunction suit aforesaid, and all these matters and arrangements were done and arranged under advice of counsel
10 and by way of settlement and compromise of the rights of the respective parties.

Petitioner, therefore, avers that the petitions set forth in the notification aforesaid by said Oglesby and Cassard are put forth with the intention and design to harass, annoy, and embarrass your petitioner in his settlement with the New Orleans Gas-Light Company, and to injure and depreciate his stock in the consolidated company.

Petitioner avers that in consequence of said notification his absolute control of a large amount of his stock in the consolidated company has been impaired, and that said notification by which defendants set up a claim to ownership of forty-seven hundred shares of stock in the Crescent City Gas-Light Company throws a cloud over the title to a large portion of the shares of the stock of the consolidated company allotted to your petitioner by the agreement of consolidation, and from the nature of said claim a
11 confussion arises which impairs and depreciates the value of the entire number of shares allotted to petitioner as aforesaid, to the damage of your petitioner in the sum of two hundred thousand dollars.

Wherefore petitioner prays that said Joseph H. Oglesby and Jules Cassard be severally cited and after due proceedings condemned, in solido, to pay petitioner the sum of two hundred thousand dollars ($200,000), with interest and costs, and for general relief.

(Signed) SEMMES & MOTT, *Attys.*

Citation to Joseph H. Oglesby.

STATE OF LOUISIANA.

Fourth District Court for the Parish of Orleans.

HENRY Y. ATRILL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD. } New Orleans. No. 43,501.

To Mr. Joseph H. Oglesby, of New Orleans.

12 You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the Fourth District Court for the Parish of Orleans, in the city of New Orleans, on Chartres street, between St. Ann and St. Anthony alley, in ten days after the service hereof.

Witness the Honorable B. L. Lynch, judge of the said court, the 12th day of April, in the year of our Lord 1875.

[SEAL.] (Signed) J. C. CHALON, *Deputy Clerk.*

Citation to Jules Cassard.

STATE OF LOUISIANA.

Fourth District Court for the Parish of Orleans.

HENRY Y. ATRILL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD. } In the city of New Orleans. No. 43,501.

To Mr. Jules Cassard, of New Orleans.

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or
13 deliver your answer to the same, in the office of the clerk of the Fourth District Court for the Parish of Orleans, in the city of New Orleans, on Chartres street, between St. Ann and St. Anthony alley, in ten days after the service hereof.

Witness the Honorable B. L. Lynch, judge of the said court, the 12th day of April, in the year of our Lord 1875.

[SEAL.] (Signed) J. C. CHALON, *Deputy Clerk.*

Sheriff's Return on Citation to Joseph H. Oglesby.

Received April 13th, 1875, and on the 14th day, same month and year, I served a true copy of the within citation and accompanying petition on Joseph H. Oglesby, one of the defendants herein, in person.

Returned same day.

Shff's fees, $2.00. (Signed) L. W. SCOTT, *Dy. Shff.*

14 *Sheriff's Return on Citation to Jules Cassard.*

Received April 13th, 1875, and on the 14th day, same month and year, I served a true copy of the within citation and accompanying petition on Jules Cassard, one of the defendants herein, in person.

Returned same day.

Sheff's fees, $2.00. (Signed) L. W. SCOTT, *Dy. Shff.*

Petition for Removal of Cause.—Filed May 29th, 1875.

To the Honorable the judge of the Parish District Court for the Parish of Orleans.

Joseph H. Oglesby and Jules Cassard, residents of the parish of Orleans and citizens of Louisiana, respectfully shows that suit has been brought in this court against them by H. Y. Atrill, a resident of Baltimore, and who is a citizen of Maryland; that the
15 suit is of a civil nature at law, and the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars.

Defendants in said suit desire to remove the same to the United States Circuit Court for the Fifth Circuit in Louisiana. They file

herewith the necessary bond, with good surety, and pray your honor to grant and order that said suit be removed as prayed for.

(Signed) RANDOLPH, SINGLETON & BROWNE,
For Petitioners.

Service accepted and submitted to the court.

(Signed) SEMMES & MOTT, *For Atrill.*

Bond.

Know all men by these presents that we, Joseph H. Oglesby and Jules Cassard as principals, defendants in a suit brought against us by Henry Y. Atrill in this honorable court, for two hundred thousand dollars, and Louis Schneider as surety, are held and firmly bound unto said Henry Y. Atrill in the sum of two hundred
16 and fifty dollars, well and truly to be paid to the said Atrill, his heirs, executors, administrators, and assigns, firmly by these presents.

The condition of the above obligation is such that whereas the obligors, Joseph H. Oglesby and Jules Cassard, have been sued by Henry Y. Atrill, in the Fourth District Court for the Parish of Orleans, for the sum of two hundred thousand dollars, exclusive of costs, and the defendants have filed a petition to remove said suit to the United States Circuit Court for the Fifth Circuit, District of Louisiana.

Now, if the said obligors shall enter in such circuit court on the first day of its next session a copy of the record in said suit, and pay all costs that may be awarded by said circuit court, if said court shall hold that said suit was wrongfully and improperly removed thereto, Then the above obligation shall be null; otherwise it
17 shall remain in full force.

(Signed) J. H. OGLESBY.
(Do.) JULES CASSARD.
(Do.) LOUIS SCHNEIDER,
Surety.

Judgment.

The application of defendants herein for the removal of this cause to the United States Circuit Court for the District of Louisiana having been submitted, and the court considering the same, it is ordered, adjudged, and decreed that this cause be, and is hereby, transferred to the United States Circuit Court for the Fifth Circuit of Louisiana, for the reasons set forth in the petition and the bond annexed thereto, as directed by the act of Congress approved 1875.

Judgment entered May 31st, 1875.

Judgment signed June 4, 1875.

(Signed) B. L. LYNCH, *Judge.*

STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Fourth District Court for the Parish of Orleans.

18 I, Edward DeBlois, clerk of the Fourth District Court for the Parish of Orleans, do hereby certify that the above and foregoing seventeen pages contain and are a full, true, and perfect transcript of the record and proceedings of the suit therein mentioned as the same remain of record in my office.

In testimony whereof, I have herewith set my hand and affixed the seal of the said court, at the city of New Orleans, on this tenth day of June, in the year of our Lord one thousand eight hundred and seventy-five, and in the ninety-ninth year of the independence of the United States of America.

[SEAL.] ED. DEBLOIS, *Clerk.*

Answer and Claim in reconvention.—Filed June 30th, 1875.

H. Y. ATTRELL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD.

United States Cir. Ct., 5th Cir., District of Louisiana.

19 Defendants admit that the Crescent City Gas-Light Co. was created by an act of the legislature of Louisiana, and that by the same authority the said act was amended, and admit also that an act was passed to authorize the consolidation of business, or manufacturing corporations or companies, as stated in the petition.

They deny that plaintiff is the sole owner of all the capital stock of the Crescent City Gas-Light Co., and aver that Joseph H. Oglesby was the owner and is still entitled to three thousand five hundred and fifty shares of the stock, and that Jules Cassard was the owner and is still entitled to eleven hundred and fifty shares of the stock of the said Crescent City Gas-Light Co., of which they were fraudulently deprived by the plaintiff, and it was to protect their rights in and to the said stock, and the proceeds thereof, and not solely with the intention or design to harass or embarrass the plaintiff, that the defendants wrote the letter which is set forth in the plaintiff's petition.

20 Defendants aver that the act of 1835, incorporating the New Orleans Gas-Light Co., was by the terms of the charter to expire on the 1st day of April, 1875; that the attempt to extend its charter by the act of 1860 being inoperative in consequence of its unconstitutionality, the legislature of 1870 incorporated the Crescent City Gas-Light Co., granting thereby to the corporators the exclusive privilege to make and vend gas in the city of New Orleans; and defendants aver that the franchises secured by said act inured to the benefit of the corporators and to all the holders of stock in said corporation.

It was in no manner contemplated by the corporators, nor by defendants, until it should appear to be necessary to do so, to lay pipes and to construct works for the manufacture of gas.

The act of 1835, incorporating the New Orleans Gas-Light Co., had made provision for the ultimate sale of the gas-works and its property to the city of New Orleans, on terms particularly
21 set forth in the act, and defendants and the corporators in the Crescent City Gas-Light Co. had in contemplation an arrangement so beneficial to the city of New Orleans that they had no doubt they would be able to buy from it the pipes, gas-works, and other property obtained by the city of New Orleans from the New Orleans Gas-Light Co., so that it was the design and object of the corporators *mutely* to organize the Co., until time should develope whether they could purchase from the city of New Orleans or should be compelled to build for themselves.

The corporation was organized by the election of a board of directors in the month of , 1870; and again, by the election of another board of directors, of which defendant Oglesby was elected president in 1871, and in 1872 another board was elected, for which defendant Cassard was president.

Neither defendants, nor corporators, nor stockholders, nor directors did more than to keep up the organization of said com-
22 pany and gave no particular attention to the elections, for the reason that the time had not arrived when it was necessary to take any step of importance in carrying out the object or purposes of the corporation.

Defendants aver that it was made known to plaintiff, who was himself and as representative of others a large operator in gas-works and gas-stocks in various cities of the United States, that this valuable monopoly had been granted by the legislature to the Crescent City Gas-Light Company. He took counsel of the validity of the said act of extension of the New Orleans Gas-Light Co., of 1860, and also of the validity of the act incorporating the Crescent City Gas-Light Co. He put forward men as directors over whom he had unbounded influence, and who were entirely subservient to his wishes, to wit: T. L. Wybray, J. M. Conway, —— Phipps, F. J. Herron. Wybray was elected president, Conway secretary, although *n*either Conway nor Phipps were eligible to the office of director in said company.

23 When Wybray and his board of directors assumed control of the company it owed no debts, and there was more than $8,000 on hand belonging to said company, and which was turned over to said directors, and the said company had no use whatever for more money.

Plaintiff confederated with said directors and induced them, for the purpose of carrying out his own scheme of sacrificing its stockholders, and of purchasing the stock of the Crescent City Gas-Light Co. for a mere nominal price, to make an assessment on the

various stockholders, among whom were defendants, and the said board levied an assessment of one and a half per cent. on the stock of said company.

The assessment of said Oglesby's stock being $6,075, and of said Cassard's being $1,725, and the said board of directors threatened to repeat said assessment and to increase it; and the said plaintiff admitted that on March 30th, 1875, the assess-
24 ment on each share of the Crescent City Gas-Light Co. had been 77½ per cent., which was nevertheless not true, no such sum having been paid.

Defendants aver that the assessments were unnecessary; that so important a step did not fall within the province of the directors under the circumstances in which they were placed; that they had made no arrangements to purchase property or to build gas-works or to lay pipes, and they had no serious design of doing either, their sole object being, instigated thereto by the plaintiff, to induce the shareholders to give up their stock that it might inure to his benefit.

These defendants made every possible remonstrance, but the directors were inexorable and insisted upon carrying out their plan. Defendants charge that at the time of these assessments the directors agreed that the stock owned by them should not be subject to assessment—a fact that has only come to the knowledge of defendants within three or four months past.

25 Defendants admit that suits were brought against them, and inasmuch as the assessments involved the payment of large sums of money by them, and inasmuch as they had just reason to believe that if they paid the assessments they would never derive any benefit therefrom, they were compelled to make the compromise set forth in the petition to prevent their utter ruin, and these defendants charge that the said Attrill and the said board of directors used the process of the courts to compel them to sacrifice their rights, or to submit to the illegal, arbitrary, and unnecessary exaction of the plaintiff and the directors.

They admit also that they made the stipulation by which the Crescent City Gas-Light Co. accepted the transfer of their stock as set forth in the petition, but the agreement to deliver up their stock, in consideration of the abandonment of the assessments and the dismissal of the suits against them as stated, was made by
26 each defendant in error of the facts; and it has but quite recently, that is, within six months, been known to them that Phipps, to whom they transferred the stock, was an agent of Attrill to combine with the other directors to compel the stockholders to sacrifice their stock as aforesaid. Nor did they know at the time, nor until within six months past, of the conspiracy between Attrill and the directors as hereinbefore charged, and but for said error of fact they would have defended the suit brought against them and would not have surrendered their stock.

Defendants allege that the act approved July 10th, 1873, No. 106, amendatory of the Crescent City Gas-Light Co., is unconstitutional, and further that there was no legal action of the stockholders signifying their acceptance of the said amendment.

The defendants further aver that the said act of amalgamation was not consummated by parties who were authorized by
27 the charter of the Crescent City Gas-Light Co. to bind it to such an obligation. They also severally allege that it was not competent for the New Orleans Gas-Light Company to enter into the stipulations set forth in the said act of amalgamation.

Defendants aver that they are entitled to the stock which the petition states that they respectively owned, and of which they have been illegally deprived.

They aver that the plaintiff has suffered no damage by reason of any matter set up in his petition against them.

Defendants deny the allegations of plaintiff's petition not herein admitted, and prays that plaintiff's claim be dismissed with costs.

(Signed) RANDOLPH, SINGLETON & BROWNE,
for Defts.

And now assuming the character of plaintiffs in reconvention, the said Joseph H. Oglesby and Jules Cassard, each for him-
28 self, avers that he resides in New Orleans and is a citizen of the State of Louisiana; that the said H. Y. Attrill, the plaintiff, resides in Baltimore and is a citizen of the State of Maryland.

The said Joseph H. Oglesby avers that he was and is the owner of three thousand five hundred and fifty shares of stock in the Crescent City Gas-Light Company; and the said Jules Cassard avers that he was and is the owner of eleven hundred and fifty shares of stock in said company, which has been rendered valueless to the said Oglesby and to the said Cassard, in *consequence* of the fraudulent acts of the said H. Y. Attrill.

They here separately repeat the various grounds urged by way of defence, to sustain this their reconventional claim, and for greater particularity each avers that the act of 1835 was, by the term of the charter, to expire on the first day of April, 1875; that the attempt to extend its charter by the act of 1860 being
29 inoperative in consequence of its unconstitutionality, the legislature of 1870 incorporated the Crescent City Gas-Light Company, granting thereby to the corporators the right to make and vend gas in the city of New Orleans; and defendants aver that the franchises secured by said act inured to the benefit of the corporators and to all the holders of stock in said corporation. It was in no manner contemplated, either by the corporators, stockholders, or defendants, until it should be necessary to do so, to lay pipes and to construct works for the manufacture of gas.

The act of 1835, incorporating the New Orleans Gas-Light Co., had made provision for the ultimate sale of the gas-works to the

city of New Orleans, on terms particularly set forth in the act to which reference is now made, and the said Oglesby and the said Cassard and the corporators in the Crescent City Gas-Light Co. had in contemplation an arrangement so beneficial to the city of New Orleans that they had no doubt they would be able to
30 buy from it the pipes, gas-works and other property obtained by the city of New Orleans from the New Orleans Gas-Light Co., so that it was the design and object of the corporators merely to organize the Co. until time should develop whether they could purchase from the city of New Orleans, or be compelled to lay pipes and build gas-works for themselves.

The corporation was organized by the election of a board of directors in 1870, and again by the election of another board in 1871, of which defendant Oglesby was president, and again by the election of another board of directors in 1872, of which defendant Cassard was president, and again in 1873 by the election of another board consisting of T. L. Wybray, Joseph Grau, I. M. Conway, —— Phipps, F. J. Herron, of which board Wybray was elected president and said Conway secretary.

Neither the said Oglesby, nor the said Cassard, nor cor-
31 porators, nor stockholders gave any particular attention to the election of directors in said company, for the reason that the time had not arrived when it was necessary to take any step of importance in carrying out the object and purposes of the said act of incorporation.

The said Oglesby and the said Cassard each aver that it was made known to the said H. Y. Attrill, who was himself, and as representative of others, a large operator in gas-works and gas-stocks in various cities of the United States; that this valuable monopoly had been granted by the legislature of Louisiana to the said Crescent City Gas-Light Co., and he set to work to obtain possession of the stock in order that he might control the Co. He combined with a set of men who were completely under his influence and subject to his management and control to put them in the office of directors of the Crescent City Gas-Light Co., and he succeeded in put-
32 ting in the following men in about 1873, to wit: Thos. L. Wybray, Joseph Grau, J. M. Conway, —— Phipps, and F. J. Herron as its directors, who when they entered on the duties of their office found the company free from debt and with a cash account on hand of upwards of eight thousand dollars, and without any use whatever for more money. Defendants severally aver that said board of directors were not legally elected and that said Phipps and Conway had not the legal qualifications for directors, and that there has been no board of directors legally called, legally organized, and having the legal qualifications since 1872, and all their acts have been null and void.

It was through his suggestion and confederacy with the said directors that plaintiff induced them to adopt a scheme whereby

he could purchase the stock of the Crescent City Gas-Light Co. for a mere nominal price, and to effect this an assessment was
33 made on the various stockholders, among whom were the said Oglesby and the said Cassard, and the said board levied an assessment of $1\frac{1}{2}$ per cent. on the stock of said company, the assessment on the said Oglesby's being $6,075, and of said Cassard's being $1,725, and the said board of directors still further to consummate the designs of the aforesaid Attrill threatened to repeat the assessments and to increase it until the entire stock should be paid up, and said plaintiff admitted that the assessment of each share of said Co. was $77\frac{1}{2}$ per cent., which was nevertheless not true.

And the said Oglesby and the said Cassard aver that the assessments were unnecessary; that so important a step did not fall within the province of the directors under the circumstances in which they were placed.

That they had made no arrangements to purchase property, to build gas-works, or to lay pipes, and they had no serious designs of doing either. Their sole object being, instigated thereto by
34 the plaintiff, to induce the shareholders to give up their stock for a mere nominal price, that it might inure to his benefit.

The shareholders, and especially the said Oglesby and the said Cassard, remonstrated against these assessments as wanton and lawless, but they were inexorable and insisted upon carrying out their plan, although they agreed that among themselves no assessments of their stock should be made.

The said Oglesby and the said Cassard admit that suits were brought against them as alleged, and inasmuch as the assessments made and threatened to be made involved the payment by them of enormous sums of money, and inasmuch as they had just reason to believe that neither of them would derive any benefit therefrom, they were compelled to make the compromise set forth in the petition to prevent their utter ruin; and the said Oglesby
35 and the said Cassard each charge that the said Attrill and the said board of directors used the process of the courts to compel each of them to sacrifice his rights or to submit to the illegal, arbitrary, and unnecessary exactions of the plaintiff and the directors, all of which would have involved their utter ruin.

And the said Oglesby and the said Cassard admit that they made the stipulations by which the Crescent City Gas-Light Co. accepted the transfer of their stock as set forth in plaintiff's petition, but the agreement to deliver up their stock in consideration of the abandonment of the assessments and the dismissal of the suits against them was made by the said Oglesby and the said Cassard in error of the facts, and it is within the year past that they have ascertained that Phipps, to whom they transferred the stock, was an agent of said Attrill, to combine with the other directors as hereinbefore charged, and but for said error of fact

they would have defended the suits brought against them
36 and would not have surrendered their stock; and they charge that said Attrill and said board of directors concealed from them the object and design of said assessments.

And the said Oglesby and the said Cassard each aver that he has ascertained within six months that the said Attrill and other capitalists at the North, not known to them, had furnished the money to the said Phipps and others to pay up the stock as soon as it could be forced upon the market by the aforesaid illegal proceedings of the aforesaid directors.

And the said Oglesby and the said Cassard each aver that they had been mislead by the said Attrill, whose assertions were made and constantly reiterated that he had bought the aforesaid stock in the market fairly and in good faith, and they each believed his statement until within six months past, when they ascertained the truth of the matter in relation to the conduct of Attrill and
37 the said board of directors presided over by Wybray, as hereinbefore set forth.

The said Oglesby and the said Cassard allege that the act approved July 10th, 1873, No. 106, amendatory of the Crescent City Gas-Light Co., is unconstitutional; and further, that there was no legal action of the stockholders signifying their acceptance of the said amendment.

They further severally aver that the said act of amalgamation was not consummated by parties who were authorized to bind it to such an obligation.

They also severally allege that it was not competent for the New Orleans Gas-Light Co. to enter into the stipulation set forth in the said act of amalgamation, and that the same is null and void.

They severally aver that the franchises of the said Crescent City Gas-Light Co. is of great value, worth not less than one hundred dollars for each share thereof; that they are severally entitled to the stock respectively owned by them as aforesaid; that
38 they have been illegally and cunningly deprived of it by the said Attrill; that he has converted the stock of the said Oglesby and the said Cassard to his own use, and that he is accountable to each of them for the value of their respective stocks, to wit., to the said Oglesby in the amount of 355,000 dollars, and to said Cassard in the amount of 11,500 dollars.

And the said Oglesby and the said Cassard each charge that the said Attrill has imposed upon the New Orleans Gas-Light Co. this act of amalgamation in order to use said Co. for the purpose of shielding the stock illegally obtained from them as aforesaid and preventing a restitution of the same respectively to them; and they hereby reserve their right of action against the said New Orleans Gas-Light Co. in liquidation, and against the stockholders thereof, if necessary, for any damage which may result to them by reason of the said act of amalgamation.

39 The said Oglesby and the said Cassard each reserves his right of action against the aiders, abettors, and confederates of the said Attrill in his illegal proceedings, whereby he obtained the control of their stock, as hereinbefore set forth.

The premises considered, the said Joseph H. Oglesby, plaintiff in reconvention, prays that the said H. Y. Attrill be cited to appear as defendant in reconvention, and that he be condemned to pay the plaintiff the sum of three hundred and fifty-five thousand dollars, with interest from judicial demand and costs of suit; and the said Jules Cassard, plaintiff in reconvention, prays that the said H. Y. Attrill be cited to appear as defendant in reconvention, and that he be condemned to pay the plaintiff the sum of one hundred and fifteen thousand dollars, with interest from judicial demand and costs of suit, and each plaintiff in reconvention prays for general relief.

(Signed) RANDOLPH, SINGLETON & BROWNE,
For Plaintiffs in Reconvention.

40 *Exception to Reconventional Demand.*—Filed March 6th, 1878.

United States Circuit Court, District of Louisiana.

H. Y. ATTRILL
vs.
JOS. H. OGLESBY AND JULES CASSARD. } No. 7,435.

Now comes the plaintiff and excepts to the demand in reconvention, on the grounds—

1st. The claims of the plaintiffs in reconvention cannot be joined in the same suit.

2. That the claims of the plaintiffs in reconvention are prescribed by one year, which prescription the plaintiff in this suit pleads.

(Signed) THOS. J. SEMMES, *of Counsel.*

41 *Rule and Grounds.*—Filed March 6th, 1878.

United States Circuit Court, District of Louisiana.

HENRY Y. ATTRILL
vs.
JOS. H. OGLESBY AND JULES CASSARD. } No. 7,435.

On motion of Thos. J. Semmes, of counsel for plaintiff, it is ordered that the defendants show cause why their demand in reconvention should not be stricken out and expunged from the files of the court on the grounds set forth in the exception this day filed, and on the further ground that said demand in reconvention discloses no cause of action against the plaintiff.

And it is ordered that this motion be notified to said defendants, and the same, together with said exception, be fixed for
42 hearing on Saturday, the 16th March, 1878, at 11 A. M.

Agreement.—Filed March 20th, 1878.

United States Circuit Court.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD. } No. 7,435.

By agreement between Mr. DeGray, for defts., and myself, this case is transferred for trial from 23d inst. to Saturday, 30th next. The clerk will please make the change.

(Signed) SEMMES.
(") RICHARD DEGRAY.

Answer to Rule and Exception.—Filed March 30th, 1878.

U. S. Circuit Court, District of Louisiana.

H. Y. ATTRILL
vs.
JOS. H. OGLESBY AND JULES CASSARD. } No. 7,435.

43 And now comes Joseph H. Oglesby and Jules Cassard, defendants and plaintiffs in reconvention, and say, in answer to the rule taken herein:

1st. That the plea of prescription filed herein goes to the merits of the action and involve questions of fact as well as law; respondents are entitled to have the same submitted to and tried by a jury.

2d. That the question as to whether the demand in reconvention can be set up here in the plea of no cause of action *are* the sole matters that can now be tried by the court.

Wherefore respondents in rule ask that all the matters herein save the question of the admission of the demand of reconvention and the plea of no cause of action, be referred to the merits, and for general relief.

(Signed) SINGLETON & BROWNE,
" R. DEGRAY,
Attys. for Defts. and Plff's. in Reconvention.

44 *Submission of Motion.*

Extract from the minutes, March 30th, 1878.

NEW ORLEANS, SATURDAY, *March 30th*, 1878.

Court met pursuant to adjournment. Present—Hon. E. C. Billings, district judge.

The motion to strike out the demand in reconvention and the plaintiff's exceptions to reconvention, came on to be heard, and having been argued by T. J. Semmes, Singleton & Browne, and R. DeGray, esqrs., the court took time to consider.

Order on Motion, April 22d, 1878.

Extract from the minutes, April term, 1878.

NEW ORLEANS, MONDAY, *April* 22, 1878.

Court met pursuant to adjournment. Present—Hon. E. C. Billings, district judge.

This cause came on to be heard on the plaintiff's exceptions to defendants' reconventional demand and motion to strike out said reconventional demand, and was argued by counsel.

45 On consideration whereof, it is ordered that the motion to strike out reconventional demand be disallowed and that the exceptions of no cause of action and plea of prescription be referred to the merits.

Submission of Cause, March 14, 1879.

November term, 1878.

NEW ORLEANS, FRIDAY, *March* 14, 1879.

Court met pursuant to adjournment. Present—Hon. E. C. Billings, district judge.

HENRY Y. ATRILL
vs.
J. CASSARD AND J. H. OGLESBY. } No. 7,435.

The court resumed the trial of this cause from yesterday, and after hearing further argument and receiving a charge from the court, the cause was submitted to the jury, who thereupon retired to consider on their verdict, the marshal being directed as heretofore to keep the jury and to provide them with necessary subsistence.

46 *Verdict.*

Extract from the minutes, March 14th, 1879.

November term, 1878.

NEW ORLEANS, FRIDAY, *March* 14*th*, 1879.

Court met pursuant to adjournment. Present—Hon. E. C. Billings, district judge.

HENRY Y. ATRILL
vs.
J. CASSARD AND J. H. OGLESBY. } No. 7,435.

And now this day, in open court, came the said jury empanelled in this cause, and having by the order of the court been duly called, each and all of the following named jurors did then and there severally answer and respond to his name as the same was severally

called: F. A. Ober, James Nott, Morris Dyer, E. L. Howell, Tom Taylor, James Doran, J. Devonshire, sr., W. C Cook, Chas. Rhodes, C. W. Miltenberger, Chas. Guerrismean; and so being present in open court, and the said Thos. J. Semmes, counsel for the
47 plaintiff, and Singleton & Browne and R. DeGray, counsel for defendants, also then and there being present in court, the said jury did then and there, being present in court, the said jury did then and there, in open court, through their foreman, Fred. A. Ober, render and deliver the following verdict, to wit: "We, the jury, find in favor of defendants on the demand of the plaintiff, Henry Y. Atrill, and we find that the reconventional demand of the defendants should be dismissed.

(Signed) FRED. A. OBER, *Foreman.*

And the said jury having so found as aforesaid, on motion of the said counsel for the defendants it was ordered by the court that the said jury be polled, and on being in due form of law severally called up and interrogated, each of said jurors for himself, in open court, then and there did declare the said verdict to be his true verdict in the premises.

And thereupon, on motion of plaintiff's attorney, it was
48 ordered that the said verdict be recorded.

Motion for a New Trial.—Entered and filed March 17th, 1879.

U. S. Circuit Court, District of Louisiana.

H. Y. ATTRILL
vs. } No. 7,435.
J. H. OGLESBY ET AL.

On motion of Singleton & Browne and R. DeGray, of counsel for defendants and plaintiffs in reconvention—

It is ordered that the plaintiff show cause herein, on Saturday, the 22d March, 1879, at 11 A. M., why a new trial should not be granted on the grounds—

1st. Because the verdict of the jury is clearly contrary to the evidence given on the reconventional demand.

2d. Because the verdict of the jury was contrary to the law as given to them by the court.

49 3d. That the court erred in excluding the testimony of Alexander Walker, esqr., attorney-at-law, when offered on behalf of the defendants and plaintiffs in reconvention.

4th. That the court erred in its instructions to the jury, as to the assessment of damages and the reconventional demand.

NEW ORLEANS, *Monday, March* 17, 1879.

Court met pursuant to adjournment.

Present—Hon. E. C. Billings, district judge.

HENRY Y. ATRILL
vs.
J. H. OGLESBY ET AL. } No. 7,435.

On motion of Singleton & Browne and R. DeGray, of counsel for defts. and plaintiffs in reconvention—

It is ordered that the plaintiff show cause herein, on Saturday, the 22d March, 1879, at 11 o'clock A. M., why a new trial should not be granted on the grounds filed.

Submission of Rule.—March 22d, 1879.

50 NEW ORLEANS, *Saturday, March* 22d, 1879.

Court met pursuant to adjournment.

Present—Hon. E. C. Billings, district judge.

HENRY Y. ATRILL
vs.
J. CASSARD ET ALS. } 7,435.

The motion for a new trial came on to be heard, and having been argued by counsel for defendants and for Atrill, the court took time to consider and allowed the attorneys a reasonable time to submit briefs.

HENRY Y. ATRILL
vs.
JULES CASSARD ET AL.

Order that the time for submitting the bills of exceptions be extended until a decision be had on the motion for a new trial.

Order, New Trial Refused.—May 22, 1879.

51 NEW ORLEANS, *Thursday, May* 22, 1879.

Court met pursuant to adjournment.

Present—Hon. E. C. Billings, district judge.

HENRY Y. ATRILL
vs.
J. CASSARD ET AL. } No. 7,435.

On due consideration of the motion herein made by the defendants for a new trial, it is ordered by the court that said motion be overruled, and that a new trial be refused.

Judgment.

Circuit Court of the United States, Fifth Circuit and District of Louisiana, November term, 1879,

NEW ORLEANS, *Friday, March* 14*th*, 1879.

Court met pursuant to adjournment.

Present—Hon. Edward C. Billings, district judge.

HENRY Y. ATRILL
vs.
JULES CASSARD AND JOSEPH H. OGLESBY. } No. 7,435.

52 By reason of the verdict of the jury and in accordance therewith, it is ordered, adjudged, and decreed that there be judgment for the defendants on the demand of the plaintiff, Henry Y. Atrill, and that on the reconventional demand of the defendants there be judgment for the plaintiff Atrill and against the said defendants. Plaintiff paying costs of suit.

Judgment rendered March 14, 1879.

Judgment signed May 23, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

13 *Bills of Exceptions taken by Defendants.*—Filled May 22d, 1879.

U. S. Circuit Court, Fifth Circuit and District of Louisiana.

H. Y. ATTRILL
vs.
H. H. OGLESBY AND JULES CASSARD. } No. 7,435.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

53 Be it remembered, that on the trial of the above-entitled cause, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention, having proved that they owned certain stock in the Crescent City Gas-Light Co. of New Orleans, on which fifty cents per share had been paid, as follows: said Joseph H. Oglesby 3,550 shares of one hundred dollars each, and said Jules Cassard 1,150 shares of one hundred dollars each, and having offered evidence tending to show and showing that they respectively parted with the same, and made a transfer thereof in blank, but that plaintiff, Atrill, through a then unknown agent, was secretly the purchaser thereof; the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Cresent City Gas-Light
54 Co., on the 7th of April, 1873, and suits entered thereon, and other threatened assessments, and having further offered evidence tending to show and showing that said assessment was levied by what was known as the Wibray board of directors, composed of Thos. L. Wibray, F. J. Herron, J. M. Conway, Jos. Gras, and F. A. Phipps, of which board said Wibray was president; and having offered further evidence tending to show and showing that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, and that in the purchase, procuring, and voting said stock said *T.* A. Phipps was secretly acting as the agent of said Attrill, and that at the time

of levying said assessment, and the institution of suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of
55 the said directors belonged to the said Attrill, and that each and every one of said directors was without any financial means or standing, and having offered evidence tending to show and showing that the effect of said assessment and suit entered thereon, and other assessments threatened to be levied, was to reduce and did reduce the market price of said stock from $\$41\frac{0}{00}$ per share to 50 cents per share, and that as soon as said assessment of $1\frac{1}{2}$ per cent was levied and suit instituted thereon, and Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill, and which then amounted to 12,500, and among which was the stock of said Oglesby and Cassard. Said Wibray fixed the price at which said broker should purchase at 50 cents per share, and told said broker if said parties holding said stock would not sell at that price, they would be assessed and sued until they did sell; and it being further
56 shown that Attrill received on said stocks transferred in blank as aforesaid, of said Oglesby and Cassard $\$41.66\frac{2}{3}$ for each and every share thereof, on the — day of April, 1875, and has received $28 per share dividend thereon since the receipt of said stock; and further evidence having been produced showing and tending to show that in June, 1873, and after the 25th day of that month, all of said remaining shares of stock not owned by said Attrill at the time of levying said assessment in April, 1873, (the whole number of shares of said company's stock being 30,000,) had been purchased by and through said broker Harris with the exception of 3,250 shares for said Attrill, but who did not know that said Attrill was the party who furnished the money to purchase said stock, or for whom the said was purchased. All further assessments were abandoned, and the buying of property and
57 building of gas-works was also abandoned, and it having been further proved by the president of said company, the said Thomas L. Wibray, that when certain stock (among whom were Oglesby's and Cassard's), who held said outstanding stock which had been sued on said assessment of $1\frac{1}{2}$ per cent. were willing to sell their stock to parties in the interest of Attrill, said Crescent City Gas-Light Co. no longer wanted to sue them, and having further offered evidence tending to prove each and every allegation in said reconventional demand contained, the court was requested by defendants and plaintiffs in reconvention to charge the jury as follows:

That if the jury find from the evidence that the assessment of one and one-half per cent. levied by the Wibray board on the 7th day of April, 1873, was levied with a different intent and with a different object from that which was expressed on its face,
58 that it was a deceit and fraud upon the stockholders; and

that if they believe from the evidence that the plaintiffs in reconvention were induced to part with their stock by such false representations, then the plaintiffs in reconvention are entitled to recover.

Which request the court refused to give, and in the place thereof gave as follows:

"I refuse that instruction. It is not enough that the avowed purpose of the directory was different from the real purpose. The jury must further find that the purpose was a fraudulent purpose."

To which refusal and instruction as given the defendants and plaintiffs in reconvention then and there, in the presence of the jury, excepted, and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

59 *Bill of Exception.*—Filed May 22, 1879.

H. Y. ATTRILL *vs.* J. H. OGLESBY AND JULES CASSARD. } U. S. Circuit Court, 5th Circuit and District of Louisiana. No. 7,435.

Bill of Exceptions of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered suit, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention having offered evidence tending to show and showing that they owned certain stock in the Crescent City Gas-Light Co. of New Orleans, on which fifty cents per share had been paid, as follows: J. H. Oglesby 3,550 shares of one hundred dollars each, and the said Jules Cassard 1,150 shares of one hundred dollars each, and having offered evidence tending to show and showing that they respectively parted with the same and made a transfer thereof in blank, but that the plaintiff, Atrill,

60 through a then unknown agent, was secretly the purchaser thereof, the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th day of April, 1873, and the suits entered thereon, and other threatened assessments up to par value of said stock; and further, having offered evidence tending to show and showing that said assessment was levied by what was known as the Wibray board of directors, composed of Thos. L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and F. A. Phipps, of which board said Wibray was president; and having offered evidence tending to prove that said board was elected by votes of stock owned

61 by said Attrill, but which stood in the names of other parties, and that in the purchase, procuring, and voting of said stock said F. A. Phipps was secretly acting as the agent of said Attrill,

and that at the time of levying said assessment and the institution of suit thereon, and other threatened assessments up to the full value of said stock, all of the stock standing in the name of each and every one of the board of directors of said company belonged to said Attrill, and that each and every one of said board of directors was without any financial means or standing; and having offered evidence tending to show and showing that the effect of said assessment levied and suit entered thereon, and other assessments threatened to be levied, was to reduce the market price of said stock from $4.00 per share to 50 cents per share, and that as soon as said assessment of 1½ per cent. was levied, and suit instituted thereon, said

62 Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill, and which then amounted to 12,500 shares (the whole number of shares in said company being 30,000), and among which outstanding stock was the stock of said Oglesby and Cassard. Said Wibray fixed the price at which said broker should purchase, which was 50 cents per share, and told said broker if said parties holding said stock would not sell at that price they would be assessed until they did sell; and further evidence being offered tending to show and showing that said Attrill secured for said stock transferred in blank as aforesaid by said Oglesby and Cassard $41.66⅔ for each and every share thereof on the — day of April, 1875, and has received $28 per share dividend thereon since the receipt of said stock.

And further evidence having been adduced, showing and tending to show that in June, 1873, and after the 25th day of

63 that month, all of the remaining shares of stock not owned by Attrill at the time of the levying of said assessment in April, 1873, had been purchased by and through said broker, Harris (with the exception of 3,250 shares), for said Attrill, but who did not know that said Attrill was the purchaser or furnished the money to make said purchase, all further assessments were abandoned and the buying of real estate and building or gas-works and other buildings likewise abandoned, and no real estate was ever bought, or works built; and it having been further proved by the president of said company, said Thomas T. Wibray, that when certain stockholders, among whom were said Oglesby and Cassard, who held said outstanding stock and who had been sued on said assessment of 1½ per cent. were willing to sell their stock to parties in the interest of Attrill, said Crescent City Gas-Light Co. no longer wanted to sue them.

And evidence having been further adduced tending to

64 show that said Attrill never paid any part of said assessment of 1½ per cent., but was only required to hold the same until it should be drawn against by the said Thomas L. Wibray, president of said company, while most of the other stockholders and all the stockholders owning the largest number of shares, and among

whom were said Oglesby and Cassard, were sued in court to enforce the payment of said assessment of 1½ per cent. And evidence having been further offered tending to show that said Oglesby and Cassard had no knowledge of the fraudulent acts charged in their reconventional demand, and of the matters of fraud herein referred to, nor of the object and purpose of said assessments, being concealed and being different from that avowed as aforesaid, nor of said Attrill's being really the purchaser of their stock transferred in blank, as aforesaid, nor of said F. A. Phipps being
65 his agent, nor of the non-payment of said assessment by said Attrill and the members of said board of directors, nor of the fact of his being the owner of said stock standing in the name of said directors, nor that said Phipps and said directors were his agents and representatives in the levying said assessments, nor of Attrill's being the author and promoter of said assessments and of the scheme to procure said stock outstanding as aforesaid at a nominal price, until within six months preceding the filing of their reconventional demand.

And further evidence having been offered tending to show that neither said Oglesby nor said Cassard had any knowledge as to who the purchaser of their stock transferred in blank as aforesaid was, until the present suit against them by Attrill was brought, wherein the name of said Phipps was stated and disclosed, and who was Attrill's agent. And having further offered evidence
66 tending to prove each and every allegation in said reconventional demand contained—

The court was requested to instruct the jury by defendants and plaintiffs in reconvention, as follows:

"That the reconventional demand of Oglesby and Cassard is a claim for the value of property, to wit., *to wit.*, a claim by the said Oglesby for the value of $3,550 shares of stock of the Crescent City Gas-Light Co., and a claim by the said Cassard for 1,150 shares of stock of the Crescent City Gas-Light Company, and not a suit for damages, within the meaning of article 3,536 of the Civil Code of Louisiana, and the prescription of one year does not apply."

Which request the court refused to give, saying, "I will give the jury the law which governs this part of the case, in my connected instruction;" and which law in said connected instruction was given as follows: "It is claimed by the plaintiffs
67 that the causes of *of* action which are set up by the defendants are *quasi offences* and are barred by the lapse of the period of one year from the time when the causes of action accrued, that is to say, from the 15th day of May, 1873, as to Oglesby, and the 22 day of May, 1873, as to Cassard.

I instruct you that the causes of action set up by the defendants under the reconventional demand are *quasi offences*, but I refuse to give you the instruction that these causes of action are barred by one year from the 15th and the 22 of May, 1873.

The reconventional demand in these cases was filed on the 30th of June, 1875. Whether it was at that time barred by the statute of prescription depends upon the fact which is to be found by you, as to whether or not the plaintiff had by any acts or hindrances of his prevented the defendants from knowing either that they
68 had been defrauded or that he, the plaintiff, was the person who had purchased their stock and had defrauded them. In order to prevent the statute of prescription from running, it is not sufficient that the defendants have established merely that they were ignorant as to who was the purchaser of the stock and the author of the alleged fraud. They must have established the fact that by some method or way originating from the plaintiff, he or those who were his agents concealed and kept the defendants in ignorance of either the fact of the fraud or that the plaintiff was the author of it.

If you find there was no such concealment, the cause of action would have arisen at the time of the sale of the stock, and since the reconventional demand of the defendants was filed more than one year after that time, the cause of action would have
69 been prescribed and your verdict upon the reconventional demand would have to be for the plaintiff.

If, on the other hand, you find that, although the cause of action arising at the time of the sale of the stock occurred on the 15th and the 22 of May, 1873, but that still by reason of the acts of hindrance of the plaintiff the defendants were kept in ignorance as to the fraud or its author, down to a time subsequent to that of the sale, then it will be for you to say how long this period of concealment lasted; and if you find that it continued so long that the defendants did not learn of the fraud or its author until a period of one year prior to the time when they filed their reconventional demand, then their demand is not prescribed. On the other hand, if you find there was a concealment, but that it did not continue so, but that for more than one year prior to the time when defendants filed their reconventional demand they knew as to the
70 fraud, and that the plaintiff was its author, then the cause of action on the part of the defendants against the plaintiff would be prescribed. That is to say, the defendants had one year within which to bring this action after the concealment on the part of the plaintiff, if any such there was, had ceased to operate.

If you find, therefore, that there was a concealment, it would be necessary for you to determine how long it lasted, and whether it had terminated or not more than a year before the reconventional demand was filed.

(To which refusal to give the above charge as above requested, and to the charge of the court as given, defendants and plaintiffs in reconvention then and there excepted, and in the presence of the jury, and tender this their bill of exceptions, which is allowed and signed accordingly.)

(Signed) EDWARD C. BILLINGS, *Judge.*

71 *Bill of Exception.*—Filed May 22, 1879.

U. S. Circuit Court, Fifth Circuit and District of Louisiana.

H. Y. ATRILL
vs. } No. 7,435.
J. H. OGLESBY AND JULES CASSARD.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered case, on the 14th day of March, 1879, defendants and plaintiffs in reconvention having offered evidence tending to prove each and every allegation in their reconventional demand contained, they requested the court to instruct the jury:

"That the damages claimed in the reconventional demand arise out of a contract of sale between J. H. Oglesby and J. Cassard on the one part, and plaintiff or his agents on the other part, and that the prescription of one year does not apply."

72 Which request the court refused to give, and that then and there, in the presence of the jury, defendants and plaintiffs in reconvention excepted to said refusal and ruling, tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22, 1879.

U. S. Circuit Court, Fifth Circuit and District.

H. Y. ATRILL
vs. } Court No. 7,435.
J. H. OGLESBY AND JULES CASSARD.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled cause, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention having proved that they owned certain stock in the

73 Crescent City Gas-Light Co. of New Orleans, on which fifty cents per share had been [paid], as follows: said Joseph H. Oglesby 3,550 shares of one hundred dollars each, and said Jules Cassard 1,150 shares of one hundred dollars each; and having offered evidence tending to show and showing that they respectively parted with the same and made a transfer thereof in blank, but that plaintiff, Atrill, through a then unknown agent, was secretly the purchaser thereof, the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said Co., with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th day of April, 1873, and suit entered thereon, and other threatened assessments up to the par value of said stock;

and having further offered evidence tending to show and showing that said assessment was levied by what was known
74 as the Wibray board of directors, composed of Thomas L. Wibray, F. J. Herron, J. M. Conway, Jas. Gros, and F. A. Phipps, of which board said Wibray was president; and having further proved that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, and that in the purchase, procuring, and voting of said stock said F. A. Phipps was secretly acting as the agent of said Attrill, and that at the time of levying said assessment and the institution of suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of said directors belonged to said Attrill, and that each and every one of the said directors was without any financial means or standing; and having offered evidence showing and tending to show that the effect of said assessment levied, and other assessments
75 threatened to be levied, was to reduce and did reduce the market price of said stock from $4.00 per share to 50 cents per share, and that as soon as said assessment of 1½ per cent. was levied and suit instituted thereon, said Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill, and which then amounted to 12,500, and among which was the stock of said J. H. Oglesby and Jules Cassard, said Wibray fixed the price at which said broker should purchase, which was 50 cents per share, and told said broker if said parties holding said stock would not sell at that price they would be assessed and sued until they did sell. And it being further shown that Attrill received for said stock, transferred in blank as aforesaid by said Oglesby and said Cassard, $41.66⅔ for each and every share thereof, on the — day of April, 1875, and has received
76 $28 per share dividend thereon since the receipt of said stock.

And further evidence having been produced showing and tending to show that in June, 1873, and after the 25th day of that month, all of said remaining shares of stock not owned by Attrill at the time the levys of said assessments in April, 1873, (the whole number of shares of said company's stock being 30,000,) had been purchased by and through said broker, Harris, with the exception of 3,250 shares, for said Attrill, but who did not know that *that* said Attrill was the party who furnished the money to purchase said stock, and for whom the same was purchased, all further assessments were abandoned, and the buying of property and building of gas-works was also abandoned; and it having been further proved by the president of said company, said Thomas L. Wibray, that when certain stockholders, among whom were Oglesby and
77 Cassard, who held said outstanding stock, and who had been sued on said assessment of 1½ per cent., were willing to sell their stock to parties in the interest of said Attrill, said Crescent City Gas-Light Co. no longer wanted to sell them. And having

further offered evidence tending to prove each and every allegation in said reconventional demand contained—

The court was requested by defendants and plaintiffs in reconvention to instruct the jury as to the measure of damages, as follows:

"If the jury believe from the evidence that Oglesby and Cassard were induced or compelled to sacrifice their stock at a nominal price by the illegal and fraudulent combination or conspiracy of the Wibray board, or a controlling portion thereof, as Attrill's agents, or that Attrell combined with the said board to accomplish said purpose of said illegal combination or conspiracy, then the damage to
78 be assessed by the jury will be the highest price known to have been allowed for these shares of stock, to wit, $41.66\frac{2}{3}$ per share, with five per cent. interest, or legal interest from date of judicial demand, subject to the deduction of the amount paid for the stock, with five per cent. interest thereon from the date of said payment, and the further deduction of such pro rata of the legal expenses actually proven to have been paid by Attrill, as the jury shall find the plaintiffs in reconvention ought to pay."

Which charge the court refused in the following words:

"I refuse this charge and will give to the jury the measure of damages in another connection."

And which measure of damages in that other connection was stated as follows:

"If you find a fraud has been perpetrated by the plaintiff against the defendants, as alleged by them, the measure of the dam-
79 ages for each defendant must be the value of the stock at the time they were fraudulently induced to part with it by the plaintiff, less fifty cents per share he paid for it.

In determining the value of this stock, this part of the case being for a quasi offence under our jurisprudence, much discretion must be left to the jury and you are to find such damages as will fully indemnify the defendants.

If you find as a fact that the stock at the time of the sale had a definate market value uninfluenced by the plaintiff, that value would be the value which you would adopt as the measure of damages, but if you find as a fact that owing to the alleged fraudulent acts of the plaintiff, *as* owing to the undetermined recognition by the courts of the validity and extent of the franchise, the defendants' corporation which were then in process of litigation, the stock of defendants' corporation had no ascertainable market value
80 but had an intrinsic value therein determined the amount for which the defendants are entitled by a verdict, you will take into consideration all of the circumstances which have been established by the evidence, including the value of the franchise, the defendants' corporation, the situation of the legal questions connected with the charter of the Crescent City Gas-Light Company, the fact that these questions were finally decided in favor of the corporation

to the extent that they were so decided; on the other hand the efforts and expenditures of the plaintiff which contributed to subsequently increase the value of the stock, and on the other hand the amount or value realized by the plaintiff from it. You will consider them and all the other circumstances which have been established before you and from all the facts of the case as the evidence has estab-
81 lished will say what is the just amount of damages which each of the defendants should recover."

To which refusal to give the said charge and instruction as asked, and to the said charge as given, defendants and plaintiffs in reconvention then and there, in the presence of the jury, excepted and tendered this their bill, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22d, 1879.

U. S. Circuit Court, Fifth Circuit and District of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD, } No. 7,435.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

82 Be it remembered, that on the trial of the above-entitled and numbered suit, on the first day of March, 1879, plaintiff having offered evidence in support of his claim and closed his case, and defendants and plaintiffs in reconvention having offered evidence in defence of said claim set up by plaintiff in his petition, and having offered evidence tending to show that said Oglesby and said Cassard, being the owners of certain shares of stock in the Crescent City Gas-Light Company of New Orleans, of one hundred dollars each, on which fifty cents per share had been paid, the said Oglesby of 3,550 shares, and the said Cassard of 1,150 shares; and having offered further evidence tending to show and showing that they respectively parted with said stock and made a transfer thereof in blank, but that the plaintiff, Attrill, through a then
83 unknown agent, was secretly the purchaser thereof—the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873—solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose of raising funds for the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., levied on the 7th day of April, 1873, and the suits entered thereon, and other threatened assessments up to the par value of said stock, and no evidence having been offered of there having been any other object or purpose of said assessment during the time said Oglesby and said Cassard were the owners of said stock; and further evidence being offered tending to show that said

assessment was levied by what was known as the Wibray board of directors, composed of said Thomas L. Wibray, F. J. Herron,
84 J. M. Conway, Jos. Gros, and F. A. Phipps, of which board said Wibray was president; and evidence having been further offered tending to show that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, and that in the purchase, procuring, and voting said stock said F. A. Phipps was secretly acting as the agent of said Attrill, and that at the time of the levying said assessment, and the institution of said suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of the board of directors of said company belonged to said Attrill, and that each and every one of said board of directors was without any financial means or standing; and plaintiffs in reconvention having offered further evidence tending to show that at the time said Wibray's board came into office, early
85 in January, 1873, there was in the treasury of said company at said time $7,250, and there were no debts due by said company, and that part of this sum was used by said Wibray's board to buy up 1,047 shares of the capital stock of said company, at $4.10 per share, which was subsequently transferred to said H. Y. Attrill; and further evidence having been offered tending to show that said Oglesby was one of the incorporators of said Crescent City Gas-Light Co., and an original subscriber to 3,000 shares of its stock, which was issued to him and for which he paid, and that from the time of the subscription and issuance of said 3,000 original shares of stock to him as aforesaid, he subsequently thereto and up to the sale in blank as aforesaid, had frequently bought and sold said stock in the market, between the time of the issu-
86 ance of said 3,000 original shares and the sale of said 3,550 shares in May, 1873. Defendants and plaintiffs in reconvention, and having offered further evidence in support of each and every allegation in said reconventional demand, and tending to establish the truth of the same, and having then closed their case—

Plaintiff offered in evidence in rebuttal of the claims of defendants and plaintiffs in reconvention and of the proof offered by them in support thereof, the deposition of F. J. Herron, a witness examined under commission, tending to show the said J. H. Oglesby, one of the defendants, and plaintiffs in reconvention, had not paid for the said original 3,000 shares of *said* in said Crescent City Gas-Light Company, subscribed as aforesaid, and that said witness, Herron, knew this fact from having frequently examined the books of said company, and that said Oglesby had also
87 purchased some stock in said company at a public succession sale of F. W. Perkins, a former secretary of said company, and that the records of said company did not show the payment of this stock of said Perkins to said Crescent City Gas-Light Company so purchased by said Oglesby as aforesaid, although certificates had

having been further proved by the president of said company that said Thomas L. Wibray, that when certain stockholders (among which were Oglesby and Cassard) who held such outstanding stock and who had been sued on said assessment of 1½ per cent. were willing to sell said stock to the parties in the interest of Att-
94 rill, said Crescent City Gas-Light Co. no longer wanted to sue them.

And having offered further evidence tending to prove each and every allegation in said reconventional demand contained—

The court was requested to charge the jury by defendants and plaintiffs in reconvention as follows:

"That if the jury find from the evidence that there was a combination or conspiracy on the part of the Wibray board to make the assessments and threatening to repeat the same, and suing for the inforcement thereof with a view to obtain the stock of the stockholders at a nominal price or compel them to sacrifice it, and that the plaintiff, Attrill, received the benefits and reaped the advantages and benefits of such a combination or conspiracy, that the plaintiffs in reconvention are entitled to recover from him as though he were an active participant in the combination or conspiracy."

95 Which charge the court refused to give, and in its general charge instructed the jury as follows:

"As a matter of law I instruct you that if the defendants have established that the assessment of one and a half per cent., or the threats of future assessments, were levied and made for the fraudulent purpose of inducing the defendants to sell their stock to the plaintiffs, and not for legitimate purposes connected with the corporation, and that this was done by the procurement of the plaintiff in his interest and by his agents, then in that case it was a fraud which was practiced upon the defendants by the plaintiff and they are entitled to recover from him whatever legal damages they have established, that they have suffered by reason thereof.

To which refusal to instruct the jury as above requested, and to the instruction as given, then and there, in the presence of
96 the jury, the defendants and plaintiffs in reconvention excepted, and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22, 1879.

U. S. Circuit Court, Fifth Circuit and District of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD. } No. 7,435.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered suit, on the first day of March, 1879, defendants and

plaintiffs in reconvention having offered evidence tending to show that they, the said Oglesby and said Cassard, being the owners
97 of certain shares of stock in the Crescent City Gas-Light Company of New Orleans, of one hundred dollars each, on which fifty cents per share had been paid, the said J. H. Oglesby of 3,550 shares, and the said Cassard of 1,150 shares; and having offered further evidence tending to show and showing that they respectively parted with said stock and made a transfer thereof in blank, but that the plaintiff Attrill, through an then unknown agent, was secretly the purchaser thereof, the former on the 15th day of May, 1873, and the latter on the 22d May, 1873, solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose, as expressed in the resolution fixing said amount, of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th of April, 1873, and the suits entered thereon,
98 and other threatened assessments up to the par value of said stock, and no evidence having been offered of there having been any other object or purpose of said assessment during the time said Oglesby and Cassard were the owners of said stock; and further evidence being offered tending to show that said assessment was levied by what was known as the Wibray board of directors, composed of Thos. L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and F. A. Phipps, of which board said Wibray was president; and further evidence being offered tending to show that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, and that in the purchase, procuring, and voting said stock said F. A. Phipps was secretly, as the agent of said Attrill, and that at the time of levying said asssessment, and the institution of the suit thereon, and the other threatened
99 assessments up to the par value of said stock, all of the stock standing in the name of each and every one of the board of directors of said Co. belonged to said Attrill, and that each and every one of said board of directors was without any financial means or standing; and plaintiffs in reconvention having offered further evidence tending to show that at the time said Wibray's board came into office, early in January, 1873, there was in the treasury of said Co. at said time $7,250, there were no debts due by said Co., and that part of this sum was used up by said Wibray's board to buy up 1,040 shares of the capital stock of this Co. at $4.10 per share, which stock so purchased as aforesaid with said companies' money was transferred thereafter to said H. Y. Attrill, the plaintiff; and defendants and plaintiffs in reconvention having produced evidence tending to prove each and every allegation
100 in their reconventional demand contained, the plaintiff offered in evidence in rebuttal of the claims of the defendants and plaintiffs in reconvention, and of the evidence given in support thereof, the deposition of F. J. Herron, a witness examined

under commission, tending to show a different and an additional object and purpose of said assessment of 1½ per cent. levied on the 7th April, 1873, and on which said Oglesby and Cassard were sued as aforesaid, from that expressed in the resolution levying said assessment, to wit, for the purpose of supplying funds to carry on a legal contest in which the said Crescent City Gas-Light Co. was engaged with the New Orleans Gas-Light Co., to fix said first-named Co. in rights and establish the legality of its charter, and which legal contest had been pending prior to said Attrill's becoming interested in said Crescent City Gas-Light Co., and prior to
101 the election of said Wibray's board of directors.

Whereupon defendants and plaintiffs in reconvention objected to the introduction of said evidence, on the ground that it was not competent to produce evidence showing a different object and purpose of said assessment of 1½ per cent. levied on the 7th of April, 1873, as aforesaid, from the object and purpose expressed on the face of the resolution levying the same, and different from the object and purpose of said assessment, as expressed in the suit in which defendants and plaintiffs in reconvention had been sued, and in consequence of which they respectively parted with their stock.

Which objection the court overruled and admitted said deposition in evidence, and thereupon, then and there, defendants and plaintiffs in reconvention, in the presence of the jury, ex-
102 cepted to said ruling and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22, 1879.

U. S. Circuit Court, Fifth Circuit and District of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD. } No. 7,435.

Bill of Exceptions of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered cause, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention having offered evidence tending to prove that they owned certain stock in the Crescent City Gas-Light Co. of New Orleans, on which fifty cents per share had been
103 paid, as follows: the said Joseph H. Oglesby 3,550 shares of one hundred dollars each, and the said Jules Cassard 1,150 shares of one hundred dollars each; and having offered evidence tending to show and showing that they respectively parted with the same and made a transfer thereof in blank, but that the plaintiff Attrill, through an then unknown agent, was secretly the purchaser thereof—the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873—solely in consequence of

the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th day of April, 1873, and the suits entered thereon, and other threatened assessments up to the par value of said stock; and further, having offered evidence tending to show and showing that said assessment was levied by what
104 was known as the Wibray board of directors, composed of Thos. L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and F. A. Phipps, of which board said Wibray was president; and having further offered evidence tending to prove that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, to wit, the said Herron, J. M. Conway, Jos. Gros, Wibray, and Phipps, and that in the purchase procuring said voting of said stock said F. A. Phipps was secretly acting as the agent of said Attrill, and that at the time of levying said assessment and the institution of suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of the board of directors of said company belonged to said Attrill, and that each and every one of said board of directors was without any financial
105 means or standing; and having offered evidence tending to show and showing that the effect of said assessment and suit entered thereon, and other assessments threatened to be levied, was to reduce the market price of said stock from $4.00 per share to 50 cents per share, and that as soon as said assessment of one and ½ per cent. was levied and suit instituted thereon, said Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill, and which then amounted to 12,500 shares, (the whole number of said shares in said company being 30,000,) and among which outstanding stock not owned by said Attrill was the stock of said Oglesby and Cassard. Said Wibray fixed the price at which said broker should purchase, which was 50 cents per share, and told said broker if said parties holding said stock would not sell at that price they would be assessed until they did sell; and further evidence being
106 offered tending to show and showing that said Attrill received for said stock transferred in blank as aforesaid by said Oglesby and Cassard, $41.66⅔ for each and every share thereof, on the — day of April, 1875, and has received $28 per share dividend thereon since the receipt of said stock.

And further evidence having been adduced tending to show that in June, 1873, and after the 25th day of that month, all the remaining shares of stock not owned by said Attrill at the time of the levying of said assessment in April, 1873, had been purchased by and through said broker, Harris, with the exception of 3,250 shares, for said Attrill, but who did not know that said Attrill was the purchaser, or furnished the money to make said purchase, all further

assessments were abandoned, and the buying of real estate and the building of works and other buildings likewise abandoned,
107 and no real estate was ever bought or works built. And it having been further proved by the president of said company, said Thomas L. Wibray, that when certain stockholders, among whom were said Oglesby and Cassard, who held said outstanding stock, and who had been sued on said assessment of 1½ per cent., were willing to sell their stock to parties in the interest of Attrill, said Crescent City Gas-Light Co. no longer wanted to sell them. And evidence having been further adduced tending to show that said Attrill never paid any part of said assessment of 1½ per cent., but was only required to hold the amount of the same until it should be drawn against by said Thos. L. Wibray, president of said company, while most of the other stockholders, and all of the stockholders owning the largest number of shares, and among whom were said Oglesby and said Cassard, were sued in court to
108 enforce the payment of said assessment of 1½ per cent. And evidence having been further offered tending to show that said Oglesby and Cassard had no knowledge of the fraudulent acts charged in the reconventional demand, and of the matters of fraud herein referred to; nor of the object and purpose of said assessment being concealed and being different from that avowed as aforesaid; nor of Attrill's being really the purchaser of their stock transferred in blank as aforesaid; nor of said Phipps being his agent; nor of the non-payment of said assessment by said Attrill and the members of said board of directors; nor of the fact of his being the owner of said stock standing in the name of said directors; nor that said Phipps and said directors were his agents and representatives in the levying said assessments; nor of Attrill's being the author, promoter, and benefecian of said assessment
109 and of the scheme to procure said stock outstanding as aforesaid at a nominal price, until within six months preceding the filing of their reconventional demand. And further evidence having been offered tending to show that neither said Oglesby nor said Cassard had any knowledge as to who the purchaser of their stock transferred in blank as aforesaid was until the present suit was commenced against them by Attrill, when the name of said Phipps as purchaser was disclosed, and who was Attrill's agent. Having offered further evidence tending to prove each and every allegation in said reconventional demand contained—

The court instructed the jury as follows:

"If you find that the defendants did not have the alleged frauds practiced on them, or that if they suffered by reason of any
110 fraud the plaintiff was not the author of, then your verdict must be against the defendants, and for the plaintiff, upon the reconventional demand.

If, on the other hand, you find that the defendants were defrauded in the manner alleged, by the plaintiff, then your verdict

must be against the plaintiff and for each defendant, to the amount which you find he has been injured by reason of the fraud; that is to say, if you find that the frauds as alleged was practiced upon the defendant Oglesby, your verdict must be for him and against the plaintiff, upon the reconventional demand, for such a sum as you find he has suffered by reason of such fraud. And so with reference to the defendant Cassard."

To which instruction the defendants and plaintiffs in reconvention, then and there, in the presence of the jury, excepted,
111 and tender this their bill of exception, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22, 1879.

H. Y. ATTRILL *vs.* J. H. OGLESBY AND JULES CASSARD. } U. S. Circuit Court, 5th Circuit and District of Louisiana. No. 7,435.

Bill of Exceptions of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered suit, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention having offered evidence tending to prove that they owned certain stock in the Crescent City Gas-Light Co. of New Orleans, on which fifty cents per share had been paid, as follows: the said J. H. Oglesby 3,550 shares of one hun-
112 dred dollars each, and the said Jules Cassard 1,150 shares of one hundred dollars each; and having offered evidence tending to show that they respectively parted with the same and made a transfer thereof in blank, but that the plaintiff, Attrill, through an then unknown agent, was secretely the purchaser thereof, the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, solely in consequence of the assessment of 1½ per cent. levied on the capital stock of said company, with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th day of April, 1873, and the suits entered thereon and other threatened assessments up to the par value of said stock; and, further, having offered evidence tending to show and showing that said assessment was levied by what was known as the
113 Wibray board of directors, composed of Thos. L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and T. A. Phipps, of which board said Wibray was president; and having offered evidence tending to prove that said board was elected by votes of stock owned by said Attrill, but which stood in the name of other parties, said Herron, Gros, Conway, Wibray, and Phipps, and that in the purchase, procuring, and voting of said stock, said F. A. Phipps was secretely acting as the agent of said Attrill; and that

at the time of levying said assessment and the institution of suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of the board of directors of said company belonged to said Attrill, and that each and every one of said board of directors was without any financial means or standing; and having offered
114 evidence tending to show that the effect of said assessment and suit entered thereon and other assessments threatened to be levied was to reduce the market price of said stock from $4 per share to 50 cents per share, and that as soon as said assessment of 1½ per cent. was levied and suit instituted thereon said Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill and which then amounted to 12,500 shares, (the whole number of said shares in said Co. being 30,000,) and among which outstanding stock not owned by said Attrill was the stock of said Oglesby and Cassard, said Wibray fixed the price at which said broker should purchase, which was 50 cents per share, and told said broker if said
115 parties holding said stock would not sell at that price they would be assessed until they did sell; and further evidence being offered tending to show and showing that said Attrill received for said stock transferred in blank as aforesaid by said Oglesby and Cassard $41.66⅔ for each and every share thereof, on the —— day of April, 1875, and has received $28 per share dividend thereon since the receipt of said stock.

And further evidence having been adduced tending to show that in June, 1873, and after the 25th day of that month, all the remaining shares of stock not owned by said Attrill at the time of the levying of said assessment in April, 1873, had been purchased by and through said broker, Harris, with the exception of 3,250 shares, for said Attrill, but who did not know that said Attrill was the purchaser or furnished the money to make said purchase, all
116 further assessments were abandoned, and the buying of real estate abandoned, and building of gas-works and other buildings likewise abandoned, and no real estate was ever bought or works built; and it having been further proved by the president of said company, said Thomas L. Wibray, that when certain stockholders, among whom were said Oglesby and Cassard, who held said outstanding stock, and who had been sued on said assessment of 1½ per cent., were willing to sell their stock to parties in the interest of Attrill, said Crescent City Gas-Light Co. no longer wanted to sue them; and evidence having been further adduced tending to show that said Attrill never paid any part of said assessment of 1½ per cent., but was only required to hold the amount of the same until it should be drawn against by said Thomas L. Wibray,
117 president of said company, while most of the other stockholders and all the stockholders owning the largest number of shares, and among whom were said Oglesby and said

Cassard, were sued in court to enforce the payment of said assessment of 1½ per cent.; and evidence having been further offered tending to show that said Oglesby and Cassard had no knowledge of the fraudulent acts charged in their reconventional demand, and of the matters of fraud herein referred to, nor of the object and purpose of said assessment being concealed and being different from that avowed as aforesaid, nor of Attrill being really the purchaser of their stock transferred in blank as aforesaid, nor of said Phipps being his agent, nor of the non-payment of said assessment by said Attrill and the members of said board of directors, nor of

118 the fact of his being the owner of said stock standing in the name of said directors, nor that said Phipps and said directors were his agents and representatives in the levying said assessment, nor of Attrill being the author and promoter and beneficiary of said assessments and of the scheme to procure said stock outstanding as aforesaid, at a nominal price, until within six months preceding the filing of their reconventional demand; and further evidence having been offered tending to show that neither said Oglesby nor said Cassard had any knowledge as to who the purchaser of their stock transferred in blank as aforesaid was, until the present suit against them by Attrill was brought, wherein the name of said Phipps as purchaser was stated and disclosed, and who was Attrill's agent; and having further offered evidence tending

119 to prove each and every allegation in said reconventional demand contained—

The court was requested to instruct the jury by defendants and plaintiffs in reconvention, as follows:

"That if the jury believe Oglesby and Cassard were defrauded of their stock in the Crescent City Gas-Light Company through the fraudulent combination of Attrill, Wibray, Herron, Gros, Phipps, and Conway, the damages to which they are respectively entitled is the amount of loss they have respectively sustained and the profits of which they have been respectively deprived."

Which request the court refused to give, saying:

"I have stated the principles of law which are to govern the jury with reference to the subject-matter of this charge, and therefore will not give this disconnected instruction."

And which principles of law, to which the court here refers, were given as follows:

120 If you find a fraud has been perpetrated by the plaintiff against the defendants, as alleged by them, the measure of the damages for each defendant must be the value of the stock at the time they were fraudulently induced to part with it by the plaintiff to him, less the fifty cents per share which he received.

In determining the value of this stock, this part of the case being for a quasi offence under our jurisprudence, much discretion must be left to the jury, and you are to find such damages as will fully indemnify the defendants.

If you find as a fact that the stock had at the time of the sale had a definite market value uninfluenced by the plaintiff, that value would be the value which you would adopt as the measure of damages; but if you find as a fact that, owing to the alleged
121 fraudulent acts of the plaintiff, as owing to the undetermined recognition by the courts, of the validity and extent of the franchise, the defendants' corporation, which were then in process of litigation, the stock of the defendants' corporation had no ascertainable value, but had an intrinsic value therein, determined the amount for which the defendants are entitled by a verdict, you will take into consideration all of the circumstances which have been established by the evidence, including the value of the franchise of the defendants' corporation, the situation of the legal questions connected with the charter of the Crescent City Gas-Light Co., the fact that those questions were finally decided in favor of the corporation to the extent, on the one hand, the efforts and expenditures of the plaintiff which contributed to subsequently
122 increase the value of the stock; and on the other hand, the amount or value realized by the plaintiff from it; you will consider them and all the other circumstances which have been established before you, and from all the facts of the case, as the evidence has established, will say what is the just amount of damage which each of the defendants should receive."

To which refusal to give the above charge as above requested, and to the charge of the court as given, defendants and plaintiffs in reconvention then and there, in the presence of the jury, excepted. Which exception is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

123 *Bill of Exception.*—Filed May 22, 1879.

U. S. Circuit Court, Fifth Circuit and Dist. of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD. } No. 7,435.

Bill of Exception of Defendants and Plaintiffs in Reconvention.

Be it remembered, that on the trial of the above-entitled and numbered suit, on the 14th day of March, 1879, the defendants and plaintiffs in reconvention having offered evidence tending to show and showing that they owned certain stock in the Crescent City Gas-Light Company of New Orleans, on which fifty cents per share had been paid, as follows: J. H. Oglesby 3,550 shares of one hundred dollars each, and the said Jules Cassard 1,150 shares of one
124 hundred dollars each; and having offered evidence tending to show and showing that they respectively parted with the same and made a transfer thereof in blank, but that plaintiff, Attrill,

through an then unknown agent, was secretly the purchaser thereof, the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, solely in consequence of the assessment of one and a half per cent. levied on the *cipal* stock of said company, with the avowed purpose of the purchase of real estate for the location of the works and other buildings of the Crescent City Gas-Light Co., on the 7th day of April, 1873, and the suits entered thereon, and other threatened assessments up to the par value of said stock; and having further offered evidence tending to show and show-
125 ing that said assessment was levied by what was known as the Wibray board of directors, composed of Thomas L. Wibray, F. J. Herron, J. M. Conway, Jos Gros, and F. A. Phipps, of which board said Wibray was president. And having further offered in evidence tending to prove that said board was elected by votes of stock owned by said Attrill, but which stood in the names of other parties, and that in the purchase, procuring, and voting of said stock said F. A. Phipps was secretly acting as the agent of said Attrill, and that at the time of levying said assessment, and the institution of the suit thereon, and other threatened assessments up to the par value of said stock, all of the stock standing in the name of each and every one of said directors belonged to said Attrill, and that each and every one of said directors
126 was without any financial means or standing. And having offered evidence showing and tending to show that the effect of said assessment levied and suit entered thereon, other assessments threatened to be levied, was to reduce the market price of said stock from $4.00 per share to 50 cents per share, and that as soon as said assessment of 1½ per cent. was levied and suit instituted thereon said Wibray employed a broker named Harris to purchase all the remaining stock then outstanding and not owned by said Attrill, and which then amounted to 12,500 shares, (the whole number of shares in said Co. being 30,000,) and among which was the stock of said Oglesby and Jules Cassard; said Wibray fixed the price at which said broker should purchase,
127 which was 50 cents per share, and told said broker if said parties holding said stock would not sell at that price they would be assessed until they did sell. And it being further shown that Attrill received for said stock transferred in blank as aforesaid by said Oglesby and Casard, $41.66⅔ for each and every share thereof, on the —— day of April, 1875, and has received $28 per share dividend thereon since the receipt of said stock.

And further evidence having been adduced showing and tending to show that in June, 1873, and after the 25th day of that month, all of the remaining shares of stock not owned by Attrill at the time of the levying of said assessment in April, 1873, had been purchased by and through said broker Harris, with the exception
128 of 3,250 shares, for said Attrill, but who did not know that

said Attrill was the purchaser, or furnished the money to make said purchase. All further assessments were abandoned, and the buying of real estate, and the building of gas-works and other buildings was also abandoned, and no real estate was ever bought or works built. And it having been further proved by the president of said company, said Thomas L. Wibray, that when certain stockholders, among whom were said Oglesby and said Cassard, who held said outstanding stock and who had been sued on said assessment of 1½ per cent., were willing to sell their stock to parties in the interest of Attrill, said Crescent City Gas-Light Company no longer troubled to sue them.

129 And evidence having been further adduced tending to show that said Attrill never paid any part of said assessment of 1½ per cent., but was only required to hold the same until it should be drawn against by the president of the company, while most of the other stockholders, and all the stockholders owning the largest number of shares, and among whom were said Oglesby and said Cassard, were sued in court to enforce the payment of said assessment of 1½ per cent. And evidence having been further offered tending to show that said Oglesby and Cassard had no knowledge of the fraudulent acts charged in their reconventional demand, and of the matters of frauds herein referred to, nor of the object and purpose of said assessments being concealed and being different from that avowed as aforesaid, nor of said Attrill's being

130 really the purchaser of their stock transferred in blank as aforesaid, nor of the non-payment of said assessment by said Attrill and the members of said board of directors, nor of the fact of his being the owner of said stock standing in the name of said directors, nor that said Phipps and said directors were his agents and representatives in the levying said assessments, nor of Attrill's being the author and promoter of said assessments and of the scheme to procure said stock outstanding as aforesaid at a nominal price, until within six months preceding the filing of their reconventional demand. And further evidence having been offered tending to show that neither said Oglesby nor said Cassard had any knowledge as to who the purchaser of their stock trans-

131 ferred in blank as aforesaid was until the present suit against them by Attrill was brought, wherein the fact was stated and disclosed that said purchaser was said *T.* A. Phipps, who was Attrill's agent. And having offered further evidence tending to prove each and every allegation in said reconventional demand contained—

The court was requested to charge the jury by defendants and plaintiffs in reconvention, as follows:

That if the jury believe from the evidence that there was a combination or conspiracy, on the part of the plaintiff or said board of directors as his agents and representatives, to deprive Oglesby and Cassard of their stock by fraudulent representations, and that At-

trill reaped the benefit of that, prescription does not begin to run until that fraud was discovered by the plaintiffs in reconvention."

132 The court refused to give said request, and charged as follows:

I refuse that instruction. The rule that I give to the jury is this: if the plaintiff perpetrated the fraud, as alleged by the defendants, and concealed the same from the defendants, or if he concealed from them that he was the author of the fraud or purchaser of the stock, prescription would not commence to run so long as plaintiff maintained this concealment.

To which refusal to charge as requested, and to the said charge as given, defendants then and there, in the presence of the jury, excepted and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

133 *Bill of Exception.*—Filed May 22, 1879.

U. S. Circuit Court, Dist. of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD, Defts. and Plffs. in Reconvention. } No. 7,435.

Be it remembered, that on the trial of this cause, on the 26th day of February, 1879, plaintiffs in reconvention having alleged that the assesment levied by the board of directors of the Crescent City Gas-Light Company of New Orleans, (composed of Thomas L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and F. A. Phipps,) of one and one-half of one per cent. on the stock thereof, was false and fraudulent, and levied for the purpose of compelling the plaintiffs in reconvention to sell their stock at a mere nominal price,

134 and J. H. Oglesby, a witness on behalf of the defendants and plaintiffs in reconvention, having sworn, and on the witness stand, and being asked by counsel for plaintiff in reconvention—

"Do you know whether these assessments were true or false? (The answer to said question being relevant and material to maintain the defence and demand in reconvention.) Whereupon plaintiff objected on the ground that it was a mere matter of opinion.

And the court sustained the objection, and directed the witness not to answer. And thereupon the defendants and plaintiffs in reconvention excepted to the ruling of the court in the presence of the jury, and tender this their bill of exceptions, which

135 may be signed by the court and made a part of the record, which is allowed and done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exceptions.—Filed May 22, 1879.

U. S. Circuit Court, District of Louisiana.

H. Y. ATTRILL
vs.
JOS. H. OGLESBY & JULES CASSARD, Defts and Plffs. in Reconvention. } No. 7,435.

Be it remembered, that on the trial of this cause, on the first day of March, 1879, defendants and plaintiffs in reconvention having introduced evidence to the satisfaction of the court showing and tending to show a prima facie case of conspiracy (as charged in
136 the reconventional demand and answer of said Cassard and Oglesby), and having also produced evidence tending to show that the said Oglesby and the said Cassard were the owners of certain shares of the capital stock of the Crescent City Gas-Light Company of New Orleans, in the month of April and May, 1873, the former of 3,550 shares of $100 each, the latter of 1,150 shares of $100 each; and having also produced evidence tending to show that they sold and transferred in blank, the former on the 15th May, 1873, the latter on the 22d May, 1873, their shares of stock aforesaid, and that said sales and transfers were made solely in consequence of an assessment of one and one-half of one per cent. levied on said shares of stock on 7th of April, 1873, and other threatened assess-
137 ments up to the par value of said shares, and of suits brought to enforce the collection of the assessment levied. And having also produced evidence tending to show that the board of directors of said Crescent City Gas-Light Company, under whose direction the assessment aforesaid was levied, assessments threatened, and suits brought, was composed of Thomas L. Wibray, F. J. Herron, J. M. Conway, Jos. Gros, and F. A. Phipps, known as the Wibray board. And having also produced evidence tending to show and showing that the plaintiff, H. Y. Attrill, owned at the time said assessment was levied and thereafter a largely controlling portion of the stock of the Crescent City Gas-Light Company. And having also produced evidence tending to show that each and all of said board of directors were men of no pecuniary means, and
138 were men of straw, and were elected by stock of said Attrill, standing in the name of said Phipps, who was secretary, acting as Attrill's agent.

The defendants and plaintiffs in reconvention offered Alexander Walker as a witness on their behalf, and by whom they expected and intended to prove, and offered him as a witness for the purpose of proving that the real object of said assessment of one and one-half of one per cent. on said stock was to compel the defendants and plaintiffs in reconvention to sell their stock at a mere nominal price, and that said assessment was for no other purpose, and that there was a combination and conspiracy between said

board of directors and the said Attrill, plaintiff, to deprive and defraud said Oglesby and said Cassard of their stock aforesaid, and also that the said board of directors were under the control and direction of said Attrill, plaintiff.

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And the said witness, Walker, having testified that he was first the attorney of the company, employed by the Crescent City Gas-Light Company, and remained under the former administration and the one which succeeded (the Wibray board being meant) as attorney down to the final success of the suit against the old or New Orleans Gas-Light Company in the supreme court, and down to the act of consolidation, as the witness thought, and that his relations with Mr. Wibray and Attrill and the other gentlemen were entirely professional relations, for which they compensated him, and that was all he had to do as attorney and client, down to the consolidation, which was on the 25th of March, 1875.

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And the witness having been asked if Attrill said anything to him about an opinion of the Eighth District Court for the Parish of Orleans, which had been *been* rendered in the suit entitled The State of Louisiana vs. The New Orleans Gas-Light Company, and the court having asked said witness, as follows:

"With reference to this conversation to which Mr. DeGray has called your attention, and which is the chief object of inquiry, did the conversation take place with you as the attorney of Attrill, personally? And said witness, Walker, having answered, It was only as the representative of the company."

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And said witness having further testified that he never was said Attrill's attorney, personally, but only as a mandatory for the company, and having further testified that he considered Attrill personally his client as well as the company, and that he never had any conversations with Attrill on the matters connected with the Crescent City Gas-Light Company, except as attorney and client, down to the said act of consolidation, and that his whole connection with Attrill was as president of the Crescent City Gas-Light Company; but never in any personal matter, and that he never was *never* directly Attrill's attorney, except in relation to this gas company; that is, never had any private transaction with Attrill. That he was the attorney of the Crescent City Gas-Light Company, and went on with the proceedings and was introduced to Attrill as an officer of the company largely interested in the company, and that was the only relation between witness and said Attrill. That the said witness had never been the counsel or attorney of said company with reference to the said assessment of 1½ per cent., and did not know even that the suits were brought, and that at the time Attrill employed him he considered Attrill was the principal stockholder interested in said company; that he was paid his fees by Attrill, Wibray, and received fees from Attrill individually. And it being proved that during the time of said witness', Walker's, connection with said

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company as counsel, said Attrill was treasurer and president
143 of said company. And said Walker having further testified that his fees were generally paid by Mr. Wibray or Herron, and that Mr. Attrill paid him also, and paid him for services in connection with said company—the suit which he was conducting for said company—that one of said fees was received before he saw Attrill and another from Attrill through Mr. Randolph for services in connection with the said suit, and that on one occasion he asked for a fee and Attrill directed Wibray to pay the same, and that Wibray, when said witness asked for said fee, referred him to Attrill. And having further testified that he never was the counsel for the company nor for Attrill in reference to, and never was consulted in regard to said one and one-half per cent. and twenty
144 per cent. assessments which were respectively levied in April, 1873, and May, 1873.

And said witness having been asked "When said Attrill employed him," and having answered "Originally, Mr. Attrill did not employ him, but he came in under his, Attrill's, administration; that said Attrill was introduced to said witness, and that witness' relations to him were those of the representative of the Crescent City Gas-Light Company; that he, witness, claimed and afterwards instituted a suit against said Attrill for services, alleging that he, witness, was attorney of said company from the institution of the suit in the court in 1871 down to the act of consolidation; and having further testified that in the first instance he was employed by the several boards of directory preceding the Wibray board, of one of which said Oglesby was president, and prior to Attrill's having
145 any connection with said company and recognized as counsel afterwards by the company, and that at the time the employment was made it was special, but that he was consulted afterwards by the organization of the company and considered himself so, and brought suit and acted for the company down to the time of the consolidation, and was called in to look at their minutes and considered himself generally the attorney of the company, and said witness having been asked—

"Were you ever Mr. Attrill's individual attorney? And answered, "Never, that I know of. It was only as a representative of this gas company. I had no individual suits for him.

And said witness having further testified that when said Attrill first came to New Orleans he was introduced to said witness
146 as a large capitalest, and as a manager and representative of this company, and that Attrill had never spoken to him (witness) about said assessments; and said witness being asked as follows, and the said Walker further testified Attrill had never spoken to him about said assessments:

"I desire to ask you as to whether Attrill said anything to you about the directory being under his management and control; if so, what did he say? state all he said, and the subject.

Whereupon the plaintiff, by his counsel, objects to the question, which objection the court maintains, and refuse to allow the enquiry to be made.

And thereupon defendants and plaintiffs in reconvention, by their counsel, except to the ruling of the court, in the presence
147 of the jury, and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception.—Filed May 22, 1879.

U. S. Circuit Court, District of Louisiana.

H. Y. ATTRILL
vs.
J. H. OGLESBY AND JULES CASSARD, DEFENDANTS and Plaintiffs in Reconvention. } No. 7,435.

Be it remembered, that on the trial of this cause, on the 1st day of March, 1879, defendants and plaintiffs in reconvention having introduced evidence to the satisfaction of the court showing and tending to show a conspiracy, prima facie (as charged in the
148 reconventional demand of the said Oglesby and the said Cassard; and having produced evidence showing and tending to show that the said Oglesby and the said Cassard were the owners of certain shares of the capital stock of the Crescent City Gas-Light Co. of New Orleans, in the months of April and May, 1873, the former of 3,550 shares of one hundred dollars each, and the latter of 1,150 shares of one hundred dollars each; and having produced evidence tending to show that they sold and transferred in blank, the former on the 15th day of May, 1873, and the latter on the 22d day of May, 1873, their shares of stock aforesaid, and that said sales and transfers were made solely in consequence of an assessment of one and one-half of one per cent. levied on said shares of stock, in April, 1873, and other threatened assessments
149 up to the par value of said shares, and of suits brought to enforce the collection of the assessments levied.

And having produced evidence tending to show that the board of directors of said Crescent City Gas-Light Company, under whose direction the assessment aforesaid was levied, assessments threatened, and suits brought, was composed of Thomas L. Wibray, F. J. Herron, Jos. Gros, J. M. Conway, and F. A. Phipps, known as the Wibray board; and having also produced evidence tending to show that the plaintiff, H. Y. Attrill, owned at the time a largely controlling portion of the stock of the Crescent City Gas-Light Company aforesaid, and that said Wibray board was elected by stock secretely owned by said Attrill, and were without any financial means or standing, when the plaintiffs in reconvention introduced Alexander Walker, a witness on their behalf, who be-

150 ing duly sworn, and by which witness they expected to prove, and offered him for the purpose of proving that the real object of said assessment of one and one-half of one per cent. was to compel the defendants and plaintiffs in reconvention and other stockholders to sell their stock at a mere nominal price, and that said assessment was for no other purpose; and that there was a combination and conspiracy between said board and the plaintiff, Attrill, to deprive and defraud said Oglesby and said Cassard of their stock aforesaid, all of which was material to said Oglesby and said Cassard's cause; and the said witness, Walker, having testified that he was first attorney of the company, employed by the Crescent City Gas-Light Company, and remained under the former administration and the one which succeeded, (the Wibray
151 board meant,) as attorney down to the final success of the suit against the old or New Orleans Gas-Light Company, in the supreme court, and down to the act of consolidation, as witness thought, and that his relations with the Wibray and Attrill and the other gentlemen were entirely professional relations, for which they compensated him; that his relations were entirely professional, and that was all he had to do as attorney and client down to the consolidation, (which was on the 25th March, 1875;) and the witness having been asked if Attrill said anything to him about an opinion of the Eighth District Court for the Parish of Orleans, which had been rendered in the suit entitled The State of Louisiana vs. The New Orleans Gas-Light Company, and the court having asked said witness as follows:

152 "With reference to this conversation to which Mr. DeGray has called your attention and which is the chief object of inquiry, did the conversation take place with you as the attorney of Attrill personally? And said witness, Walker, having answered "It was only as the representative of the company." And said witness having further testified that he never was said Attrill's attorney personally but only as a mandantory for the company; and having further testified that he considered Attrill personally his client as well as the company, and that he never had any conversations with Attrill on the matters connected with the Crescent City Gas-Light Company, except as attorney and client, down to the said act of consolidation, and that his whole connection with Attrill was as president of the Crescent City Gas-Light Company, but
153 never in any personal matter, and that he never was individually Attrill's attorney, except in relation to this gas company; that is, never had any private transaction with Attrill; that he was the attorney of the Crescent City Gas-Light Company, and went on with the proceedings and was introduced to Attrill as an officer of the company largely interested in the company, and that was the only relation between him, witness, and said Attrill; that he, said witness, had never been the counsel or attorney of said company with reference to said assessment of 1½ per cent., and did not

know even that the suits were brought, and that at the time Attrill employed him he considered Attrill was the principal stockholder interested in said company; that he was paid his fees by Attrill and Wibray, and received fees from Attrill individually. And
154 it being proved that during the time of said witness, Walker's, connection with said company said Attrill was financial agent and treasurer and president of said company. And said Walker having further testified that his fees were generally paid by Mr. Wibray or Herron, and that Mr. Attrill paid him also, and that Mr. Attrill paid him for services in connection with the said company, the suit which he was conducting for said company; that one of said fees was received before he, said Attrill, and another from Attrill through Mr. Randolph, for services in connection with the said suit, and that on one occasion he asked for a fee and Attrill directed Wibray to pay the same, and that Wibray, when said witness asked for said fee, referred him to Attrill. And having
155 further testified that he never was the counsel for the company nor for Attrill in reference to and never was consulted in regard to said one and a half per cent. and twenty per cent. assessments, which were respectively levied in April, 1873, and May, 1873, and said witness having been asked "when said Attrill employed him," and having answered—

"Originally Mr. Attrill did not employ him, but he came in under his (Attrill's) administration; that said Attrill was introduced to said witness, and that witness' relation to him were those of the representative of the Crescent City Gas-Light Company; that he, witness, claimed and afterward instituted a suit against said Attrill for services, alleging that he, witness, was the attorney of the said company from the institution of the suit in the court in 1871 down to the act of consolidation. And having further testified that
156 in the first instance he was employed by several boards by the directory preceding the Wibray board, of one of which said Oglesby was president, and prior to Attrill's having any connection with said company, and that he was continued and recognized as counsel afterwards by the company, and that at the time the employment was made it was special, but that he was consulted afterwards by the organization of the company, and considered himself so, and brought suit and acted for the company down to the time of the said consolidation, and was called in to look at their minutes, and considered himself generally the attorney of the company.

Witness having been asked, said—

"Were you ever Mr. Attrill's individual attorney? and answered—

157 "Never that I know of; it was only as a representative of the gas company; I had no individual suits for him."

And said witness having further testified that when said Attrill first came to New Orleans he was introduced to said witness as a large capitalist and as a manager and representative of this com-

pany, and that Attrill had never spoken to him (witness) about said assessments. And said Walker further testified, Attrill had never spoken to him about said assessments.

And the said witness being asked as follows:

"What, if anything, was said to you by Thomas L. Wibray, or F. J. Herron, or any of the members of said board of directors, as to the object and purpose of the assessment of one and
158 a half per cent. and twenty per cent., which were respectively levied in April and May, 1873?"

Whereupon the plaintiff, by his counsel, objected to the question, on the ground that the matter enquired of was a privileged communication.

Which objection the court maintained, and refused to allow the inquiry to be made, and thereupon the defendants and plaintiffs in reconvention, by their counsel, excepted to the ruling of the court, in the presence of the jury, and tender this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition and Order for Writ of Error.—Filed May 24, 1879.

159 HENRY Y. ATTRILL
vs.
JOSEPH H. OGLESBY AND JULES CASSARD. } No. 7,435.

To the honorable the judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana.

The petition of Joseph H. Oglesby and Jules Cassard, defendants and plaintiffs in reconvention in the above-entitled and numbered suit,—

Respectfully represents that on the 14th day of March, 1879, judgment was rendered against them by this hon. court, and in favor of the said H. Y. Attrill, which was signed on the 23d day of May, 1879.

Your petitioners consider that manifest error hath happened, to the great injury and damage of petitioners, and feeling
160 aggrieved by said judgment, they desire to prosecute a writ of error from the aforesaid judgment before the Supreme Court of the United States.

Wherefore your petitioners pray that a writ of error be allowed them from the judgment heretofore referred to, returnable before the Supreme Court of the United States, in accordance with law, upon petitioners giving bond in the sum of five hundred dollars, conditioned according to law, with F. T. Duval as surety.

(Signed) CHAS. B. SINGLETON,
(") R. H. BROWNE,
(") RICHARD DEGRAY,
Attys. for Petitioners.

Order.

161 A writ of error is allowed in this case as prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1879, the petitioners giving bond in the sum of five hundred dollars, with good and solvent security, conditioned as the law directs.

New Orleans, May 24th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for Writ of Error.—Filed May 24th, 1879.

Know all men by these presents that we, Joseph H. Oglesby and Jules Cassard as principals, and Frank T. Duval as surety, are held and firmly bound unto Henry Y. Attrill in the full and just sum of five hundred dollars, to be paid to the said Henry
162 Y. Attrill, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, and jointly and severally, by these presents. Sealed with our seals, and dated this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Henry Y. Attrill is plaintiff, and Joseph H. Oglesby and Jules Cassard are defendants. Judgment was rendered against the said Joseph H. Oglesby and Jules Cassard, defendants, and the said Joseph H. Oglesby and Jules Cassard, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to
163 reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Y. Attrill, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such that if the said Joseph H. Oglesby and Jules Cassard shall prosecute — writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else remain in full force and virtue.

(Signed)	J. H. OGLESBY.	[L. S.]
"	JULES CASSARD.	[L. S.]
"	F. T. DUVAL.	[L. S.]

Sealed and delivered in presence of—

(Signed) RICHARD DEGRAY.

Bond approved May 24, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

164 UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Circuit and District of Louisiana.

Clerk's office:

I, Francis A. Woolfley, clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, do hereby certify that the foregoing 163 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Henry Y. Atrill vs. Joseph H. Oglesby and Jules Cassard, No. 7,435 of the Docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 6th day of Septr., A. D. 1879. (Six words erased null approved.)

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 6th day of September, A. D. 1879.

EDWARD C. BILLINGS, *Judge.*

165 THE UNITED STATES OF AMERICA.

Circuit Court of the United States, District of Louisiana.

The President of the United States to Henry Y. Atrill, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, wherein Joseph H. Oglesby and Jules Cassard are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Joseph H. Oglesby and Jules Cassard, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

EDWARD C. BILLINGS, *Judge.*

166 (Endorsed:) United States circuit court. T. J. Semmes, atty. of record. No. 7,435. Joseph H. Oglesby and Jules Cassard, plaintiffs in error, vs. Henry Y. Atrill, defendant in error. Citation. Marshal's return. Received May 24, 1879, by the U. S. marshal, and on May 26th, 1879, I served a true copy of the within citation in error on Henry Y. Atrill, defendant in error, by handing the same to Thomas J. Semmes, esq., attorney of record, in city of New Orleans, dst. of Louisiana, and, as I am creditably informed, the said Henry Y. Atrill does not reside in the district of Louisiana. E. S. Curry, dy. U. S. marshal, district of Louisiana.

On the 27th day of May, 1879, personally appeared before me E. S. Curry, a deputy U. S. marshal for the district of Louisiana, and makes oath that he served a copy of the within citation in error on Henry Y. Atrill, as stated in his official return hereon.

E. S. CURRY,
Dy. U. S. Marshal, District of Louisiana.

Sworn to and subscribed before me, this 27th day of May, 1879.

F. A. WOOLFLEY,
Clerk U. S. Circuit Court, District of Louisiana.

167 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Henry Y. Atrill, plaintiff, and Joseph H. Oglesby and Jules Cassard, defendants, a manifest error hath happened, to the great damage of the said Joseph H. Oglesby and Jules Cassard, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 24th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

F. A. WOOLFLEY,

[SEAL.] *Clerk of the United States Circuit Court for the District of Louisiana.*

(Endorsed:) United States Circuit Court. No. 7,435. Writ of error. Joseph H. Oglesby and Jules Cassard, plaintiffs in error, versus Henry Y. Atrill, defendant in error. Filed May 24th, 1879.

F. B. VINOT, *Dy. Clk.*

(Endorsed on cover:) Louisiana C. C. U. S. No. 899. Joseph H. Oglesby and Jules Cassard, plaintiffs in error, vs. Henry Y. Atrill. Filed 7th October, 1879.

ADDITION TO RECORD.

No. 299.

Supreme Court of the United States.

JOSEPH H. OGLESBY AND JULES CASSARD, plaintiffs in error, *vs.* HENRY Y. ATTRILL. } No. 299.

In error to the circuit court of the United States for the district of Louisiana.

It is agreed that the record in the above-entitled and numbered suit be amended by inserting therein on page 16, and after the words "to the merits," as follows:

Extract from the minutes, November term, 1878.

NEW ORLEANS, *Thursday, 13th day of March*, 1879.

Court met pursuant to adjournment.

Present the honorable E. C. Billings, district judge.

This trial of this cause was this day resumed, when all the ju-
2 rors empannelled having made appearance, except Mr. Richards, for'man, who is still confined to his room by illness, the counsel agreed to go on trial with the 11 jurors present, and to dismiss Mr. Richards from further consideration of the cause. The court thereupon appointed F. A. Ober foreman of the jury, and the trial proceeded, and, after hearing argument, the cause was continued till to-morrow at 11 a. m., the marshal being directed to keep the jury and not to allow them to separate, and to provide them with necessary subsistence, the party cast to pay the costs thereof.

C. B. SINGLETON,
R. H. BROWNE,
RICHARD DE GRAY,
Counsel for Plaintiffs in Error.
THO. J. SEMMES,
Counsel for Defendant in Error.

(Indorsed:) No. 299. Supreme Court of the United States. Joseph H. Oglesby and Jules Cassard, pl'tffs in error, vs. Henry Y. Attrill, def't in error. Agreement to amend & amendment. Chs. B. Singleton, Richard H. Brown, & Richard De Gray, counsel for pl'tffs in error.

Supreme Court U. S., 1881, October term. No. 299. Joseph H. Oglesby & al., pl'ff in error, vs. Henry Y. Atrill. Stipulation of counsel and amendment to record. Filed 13 Feb'y, 1882.

FILED
FEB 27 1882
JAMES H. McKENNEY

SUPREME COURT

OF THE UNITED STATES.

No. 299.

JOSEPH H. OGLESBY AND JULES CASSARD

vs.

HENRY Y. ATTRILL.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

RICHARD DEGRAY,

C. B. Singleton

A. H. Brame

Attorneys for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

No. 299.

JOSEPH H. OGLESBY AND JULES CASSARD

vs.

HENRY Y. ATTRILL.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

STATEMENT OF THE CASE.

On the 20th day of April, 1870, the Legislature of the State of Louisiana, by special Act No. 97, created a corporation, known as the Crescent City Gas Light Company, with a capital stock of 30,000 shares, of one hundred dollars each. In this company, the plaintiffs in error became stockholders, the said Joseph H. Oglesby of 3,550 shares, and Jules Cassard of 1150 shares, on which 50 cents per share had been paid, which stock they transferred in blank, the former on the 22d of May, 1873,

and the latter on the 15th of May, 1873, under circumstances that will be noticed hereafter.

On the 9th of April, 1875, an amalgamation and consolidation, between the said Crescent City Gas Light Company and the New Orleans Gas Light Company, (a corporation also created under the laws of the State of Louisiana in 1835,) and whose existence was about to terminate by limitation was effected.

Attrill, the defendant in error, as the pretended owner of *all* of said 30,000 shares of stock of said Crescent City Gas Light Company was to receive and did receive for said 30,000 shares, on which 50 cents per share had been called and paid, 12,500 shares of full paid stock of one hundred dollars each, of the stock of the consolidated company.

Before said 12,500 shares of stock were delivered to said Attrill, plaintiffs in error, united in a letter with Joseph Hernandez, on the 10th of April, 1875, directed to the President of Gas Company, in which they declared:

"By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Company, we, the undersigned, hereby notify you that at the commencement of the litigation with your company, we were the owners of the shares in the Crescent City Gas Company, attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of said company, and that we intend to prosecute our claim to the same, and hereby notify you that any compromise or adjustment you may make with said Crescent City Gas Company will be subject to our rights to the extent above stated, and that legal proceedings will be instituted to enforce our said rights."

Thereupon, the said Attrill, on the 12th of April, 1875, brought suit at law, in the Fourth District Court for the parish of Orleans, against said Oglesby and Cassard, alleging that said notice had thrown a cloud over his ownership to said 12,500 shares of stock, and that he had been damaged thereby to the

extent of $200,000, for which he prayed judgment *in solido*, with interest and costs, pages 1 to 4.

This suit, on the application of Oglesby and Cassard, was duly removed to the Circuit Court of the United States for the District of Louisiana, where the transcript was filed on the 5th of June, 1875, and on the 30th of June, said Oglesby and Cassard filed an answer in general terms, denying the allegations of said petition, in so far as it declared their claim to ownership of stock in said Crescent City Gas Light Company was groundless, and that the above notification was sent with a view of injuring said Attrill, or depreciating the value of his stock, and at the same time, filed under Article 375, of the Code of Practice of Louisiana, a claim in reconvention wherein they respectively averred that they were respectively the owners of stock in the said Crescent City Gas Light Company, the former of 3,550 shares, and the latter of 1,150, which had been rendered valueless to them in *consequence* of the fraudulent acts of said Attrill, and which are in detail stated to be as follows :

That upon the said Attrill being made aware that this valuable monopoly had been granted by the Legislature of Louisiana, he set to work to obtain possession of the stock in order to control the company, and for that purpose he combined and conspired with a set of men who were completely under his influence and control, to put them in the office of directors of said company, and in 1873 put in as such directors Thos. L. Wibray, Joseph Gros, J. M. Conway, —— Phipps, and F. J. Herron, with whom the said Attrill combined and conspired to adopt a scheme whereby he could purchase their stock at a nominal price, and to effect this object an assessment was levied of 1½ per cent. on the stock of said company, and accompanied with a threat to repeat the same until the entire stock should be paid up, all with the avowed object of raising money to purchase property, build gas works, and lay gas pipes, but with the real object (being instigated thereto by the said Attrill) to induce

the stockholders to part with their stock at a nominal price that said Attrill might acquire the same; while at the same time it was agreed that among themselves no assessments on their stock should be made; that against these matters said Oglesby and Cassard remonstrated as wanton and lawless, but without avail, and that they were respectively sued on said assessments; but as assessments made, and threatened to be made, involved the payment by them of large sums of money, and as they had reason, do believe, and did believe, that they would never derive any benefit therefrom, to prevent their utter ruin, they consented to part with their stock, and to accomplish, which purpose the said Attrill and said directors used the process of the courts and compelled them to sacrifice their rights or to submit to the illegal, arbitrary and unnecessary exactions of said Attrill and his directors which would have involved their ruin, and that to prevent this calamity, they agreed to deliver up their stock in consideration of the abandonment of said assessments and the dismissal of the suits against them, but that said agreement was made ln error of fact, and that it was within the preceding year that they learned that Phipps, to whom they transferred their stock, was an agent of said Attrill, who had furnished the money to Phipps to purchase said stock, to combine with the other directors for the purpose aforesaid, and that but for said error of fact, they would have defended said suits and not have surrendered their stock, and that they had been mislead by said Attrill, whose assertions were constantly repeated that he had bought said stock in the market fairly and in good faith, which statements they believed until within six months prior to the filing of said reconventional demand when they ascertained the truth of the matter in relation to the conduct of said Attrill, and said directors, and that it was said Attrill who furnished the money to the said Phipps and others to buy up said stock as it could be forced on the market by the aforesaid illegal proceedings of said directors, and wherein they further claimed

that the franchises of said Crescent City Gas Light Company were of great value, and worth not less than one hundred dollars for each share of the stock thereof, and of which stock they had been illegally and cunningly deprived by the said Attrill, who had converted the same to his own use, and was accountable to them, for the value of the same, to-wit: to the said Oglesby for the sum of $355,000, and to the said Cassard for the sum of $115,000, for which they respectfully prayed judgment against said Attrill with interest and costs, pages 10 to 14.

To this reconventional demand, without any reservations whatever, the said Attrill entered an *unlimited* and *full appearance* on the 6th day of March, 1878, by excepting to said reconventional demand on the following grounds:

1st. The claims of the plaintiffs in reconvention could not be joined in the same suit.

2d. The claims of plaintiffs in reconvention were prescribed by one year, which prescription said Attrill pleaded.

And on the same day said Attrill again appeared, without any limitation, and moved to strike out and expunge from the records of the Court on the above grounds, and on the further ground that the same disclosed no cause of action said reconventional demand, and which, after due hearing, was denied, and said plea of prescription was referred to the merits.

Thereafter, said claim of plaintiff, Attrill, and said claim of Joseph H. Oglesby and Jules Cassard, defendants and plaintiffs in reconvention were heard before a court and jury, and on the the 14th day of March, 1879, said jury rendered the following verdict:

"We, the jury, find in favor of defendants on the demand of the plaintiff, Henry Y. Attrill, and we find that the reconventional demand of the defendants should be dismissed," and thereupon the Court rendered judgment for the defendants on the demand of plaintiff Attrill, and on the reconventional de-

mand for the plaintiff Attrill, and against said defendants, the plaintiff to pay costs.

In this judgment, plaintiff, Attrill, acquiesced, paid costs and has not applied for a writ of error, while defendants, and plaintiffs in reconvention, J. H. Oglesby and Jules Cassard, after having in vain applied for a new trial, applied for a writ of error, so that the only matters that are here for review, are the proceedings had on the demand in reconvention.

Error Apparent on the Record.

I. There is error in the judgment entered upon the verdict of the jury on the reconventional demand, which verdict was as follows:

"We find that the reconventional demand of the defendants should be dismissed" in this, that the judgment as entered upon said reconventional demand, Record, p. 19, was an absolute judgment against plaintiffs in error on their reconventional demand, whereas it should have been a judgment of non-suit.

Assignment of Errors.

I. The Circuit Court erred in refusing to instruct the jury as requested, to-wit: Record, page 20.

That if they believed from the evidence that the assessment of one and one-half per cent. levied by the Wilray board on the 7th of April, 1873, was levied with a different object from that which was expressed on its face, it was a deceit and fraud upon the stockholders, and if they believe from the evidence that the plaintiffs in reconvention were induced to part with their stock by such false representations, then the plaintiffs in reconvention are entitled to recover.

Which request the Court refused to give, and in place thereof, instructed the jury as follows:

"I refuse that instruction. It is not enough that the avowed

purpose of the directory was different from the real purpose. The jury must find that the purpose was a fraudulent purpose."

II. The Circuit Court erred in refusing to instruct the jury as requested, to-wit. Record, pages 23 and 24.

"That the reconventional demand of Oglesby and Cassard, is a claim for the value of property, to-wit: a claim by the said Oglesby for the value of 3,550 shares of stock of the Crescent City Gas Light Company, and a claim by the said Cassard for 1,150 shares of the Crescent City Gas Light Company, and not a suit for damages within the meaning of Article 3,536 of the Civil Code of Louisiana, and the prescription of one year does not apply.

Which request the Court refused to give, saying: "I will give the jury the law which governs the part of the case, in my connected instructions," and which law in said connected instruction was given as follows:

"It is claimed by the plaintiff that the causes of action which are set up by the defendants are QUASI OFFENCES, and are barred by the lapse of the period of one year from the time when the causes of action accrued, that is to say, from the 15th day of May, 1873, as to Oglesby, and the 22d day of May, 1873, as to Cassard."

I instruct you that the causes of action set up by the defendants, under the reconventional demand, are QUASI OFFENSES, but I refuse to give you the instruciion that these causes of action are barred by one year, from the 15th and the 22d of May, 1873,

The reconventional demand in these cases was filed on the 30th of June, 1875. Whether it was at that time barred by the statute of prescription depends upon the fact, which is to be found by you, as to whether or not the plaintiff had by any acts or hindrances of his prevented the defendants from knowing either that they had been defrauded or that he, the plaintiff, was the person who had purchased their stock and had defrauded them.

In order to prevent the statute of prescription from running, it is not sufficient that the defendants have established merely that they were ignorant as to who was the purchaser of the stock and the author of the alleged fraud. They must have established the fact that by some method or way, originating from the plaintiff, he, or those who were his agents, concealed and kept the defendants in ignorance of either the fact of the fraud, or that the plaintiff was the author of it.

If you find there was no such concealment, the cause of action would have arisen at the time of the sale of the stock, and since the reconventional demand of the defendants was filed more than one year after that time, the cause of action would have been prescribed and your verdict upon the reconventional demand would have to be for the plaintiff.

If, on the other hand you find that, although the cause of action arising at the time of the sale of the stock occurred on the 15th and the 22d of May, 1873, but that, still by reason of the acts of hindrance of the plaintiff, the defendants were kept in ignorance as to the fraud, or its author, down to a time subsequent to that of the sale, then it will be for you to say how long this period of concealment lasted ; and if you find that it continued so long that the defendants did not learn of the fraud or its author until a period of one year prior to the time when they filed their reconventional demand, then their demand is not prescribed.

On the other hand, if you find there was a concealment, but that it did not continue so, but that for more than one year prior to the time when defendants filed their reconventional demand they knew as to the fraud, and the plaintiff was its author, then the cause of action on the part of the defendants against the plaintiff would be prescribed. That is to say, the defendants had one year within which to bring this action after the concealment on the part of the plaintiff, if any such there was, had ceased to operate.

If you find, therefore, that there was a concealment, it would be necessary for you to determine how long it lasted, and whether it had terminated or not more than a year before the reconventional demand was filed.

III. The Circuit Court erred in refusing to instruct the jury, as requested, to-wit: Record, page 24.

"That the damages claimed in the reconventional demand arise out of a contract of sale between J. H. Oglesby and J. Cassard on one part, and plaintiff, or his agents, on the other part, and that the prescription of one year does not apply."

IV. The Circuit Court erred in refusing to instruct the jury, as requested, to-wit: Record, pages 27 and 28.

"If the jury believe from the evidence that Oglesby and Cassard were induced or compelled to sacrifice their stock at a nominal price by the illegal and fraudulent combination or conspiracy of the Wilray board, or a controlling portion thereof, as Attrill's agents, or that Attrill combined with the said board to accomplish said purpose of said illegal combination or conspiracy, then the damage to be assessed by the jury will be the highest price known to have been allowed for these shares of stock, to-wit: $41.66\frac{2}{3}$ per share, with five per cent. interest, or legal interest from date of judicial demand, subject to the deduction of the amount paid for the stock, with five per cent. interest thereon from the date of said payment, and the further deduction of such pro rata of the legal expenses actually proven to have been paid by Attrill, as the jury shall find plaintiffs in reconvention ought to pay."

Which charge the Court refused in the following words:

"I refuse this charge and will give to the jury the measure of damages in another connection."

And which measure of damages in that other connection was stated as follows:

"That if the jury find from the evidence that there was a combination and conspiracy on the part of the Wibray board to make the assessments and threatening to repeat the same, and suing for the enforcement of the same with the view to obtain the stock of the stockholders at a nominal price, or compel them to sacrifice it, and that the plaintiff Attril, defendant in error, received the benefits and reaped the advantages and benefits of such a combination or conspiracy that the plaintiffs in reconvention are entitled to recover from him as though he were an active participant in the combination or conspiracy."

Which charge the Court refused to give, but instructed the jury as follows: "As a matter of law, I instruct you that if the defendants have established that the assessment of one and a half per cent., or the threats of future assessments, were levied and made for the fraudulent purpose of inducing the defendants to sell their stock to the plaintiff, and not for the legitimate purposes connected with the corporation, and that this was done by the procurement of the plaintiff in his interest and by his agents, then in that case it was a fraud which was practiced on defendants by the plaintiff, and they are entitled to recover whatever legal damages they have established, that they have suffered by reason thereof. Record, page 32.

VII. The Circuit Court erred in allowing the deposition of F. J. Herron, a witness examined under commission for defendant in error, to be read to the jury, tending to show a different and an additional object and purpose of said assessment of $1\frac{1}{2}$ per cent. levied on the 7th of April, 1878, and on which said Oglesby and Cassard were sued, from that expressed in the resolution levying said assessment, to-wit: for the purpose of supplying funds to carry on a legal contest in which the said Crescent City Gas Light Company was engaged with the New Orleans Gas Light Company, to fix said first named company's rights and establish the legality of its charter, and which legal contest had been pending prior to said Attrill becoming inter-

ested in said Crescent City Gas Light Company and prior to the election of said Wibray board of directors. Record, p. 34.

VIII. The Circuit Court erred in instructing the jury as follows:

"If you find that the defendants did not have the alleged frauds practiced on them, or that if they suffered by reason of any fraud the plaintiff was *not the author of*, then your verdict must be against the defendants and for the plaintiff on their reconventional demand." Record, pages 36 and 37.

If on the other hand you find that the defendants were defrauded in the manner alleged by the plaintiff, then your verdict must be against the plaintiff and for each defendant, to the amount which you find he has been injured by reason of the fraud; that is to say, if you find that the frauds as alleged were practiced upon defendant Oglesby, your verdict must be for him and against the plaintiff, upon the reconventional demand, for such a sum as you find he has suffered by reason of such frauds and so with reference to the defendant Cassard.

IX. The Circuit Court erred in refusing to instruct the jury, as requested, to-wit:

"That if the jury believe Oglesby and Cassard were defrauded of their stock in the Crescent City Gas Light Company, through the fraudulent combination of Attrill, Wibray, Herron, Gros, Phipps and Conway, the damages to which they are respectively entitled, is the amount of loss they have respectively sustained and the profits of which they have been respectively deprived."

Which request the Court refused to give, saying:

"I have stated the principles of law which are to govern the jury with reference to the subject matter of this charge, and, therefore, will not give this disconnected instruction;" and which principles of law to which the Court above referred were given as follows:

And then followed the charge as stated in the fourth assignment of error. Record, pages 39 and 40.

X. The Circuit Court erred in refusing to instruct the jury, as requested, to-wit:

"That if the jury believe from the evidenee that there was a combination or conspiracy, on the part of the plaintiff, or said board of directors, or his agents and representatives, to deprive Oglesby and Cassard of their stock by fraudulent representations, and that said Attrill reaped the benefits of that, prescription does not begin to run until the fraud was discovered by the plaintiffs in reconvention.

This request the Court refused to give and charged as follows:

"I refuse that instruction. The rule that I give the jury is this: if the plaintiff perpetrated the fraud, as alleged by defendants, and concealed the same from the defendants, or if he concealed from them that he was the author of the fraud, or purchaser of the stock, prescription would not commence to run so long as the plaintiff maintained this concealment." Record, pages 43 and 44.

XI. The Circuit Court erred in refusing to allow J. H. Oglesby, a witness produced and sworn for plaintiff in error, to be asked whether he knew that the assessments, which had been alleged to have been false and fraudulent and levied for the purpose of compelling plaintiffs in error, to sell their stock at a nominal price, were true or false, which question was objected to on the ground that it was a mere matter of opinion, and the objection was sustained on that ground.

XII. The Circuit Court erred in rejecting the evidence of Alexander Walker, a witness produced by plaintiffs in error, and by whom they expected and tended to prove, and whom they offered for the purpose of proving that the real object of the assessment of one and one-half per cent. set out in the pleadings, on the stock of the company, was to compel plaintiffs in

error to sell their stock at a mere nominal price, and that said assessment was for no other purpose, and that there was a combination and conspiracy between said board of directors and Attrill, defendant in error, to deprive and defraud said plaintiffs in error of their stock, and that said board of directors were under the control and direction of said Attrill, defendent in error, and in refusing to allow said witness to be examined and interrogated on the matter aforesaid, and with the purpose and view of entering upon an inquiry of, and establishing said matters to allow said witness to answer the following question:

"I desire to ask you as to whether Attrill said anything to you about the directory being under his management and control; if so, what did he say? State all he said on the subject."

XIII. The Circuit Court erred in rejecting the evidence of Alexander Walker, a witness produced by plaintiffs in error, by whom they expected and intended to prove, and offered him for the purpose of proving that the real object of the assessments of one and one-half per cent. set out in the pleadings on the stock of the company, was to compel plaintiffs in error to sell their stock at a mere nominal price, and that said assessment was for no other purpose, and that there was a combination and conspiracy between said board of directors and Attrill, defendant in error, to deprive and defraud said plaintiffs in error of their stock, and that said board of directors were under the control and direction of said Attrlll, defendant in error, and in refusing to allow said witness to be examined and interrogated on the matters aforesaid, and with the purpose and view of entering upon and inquiring of, and establishing said matters, to refuse to allow said witness to answer the following question:

"What, if anything was said to you by Thomas L. Wibray or F. J. Herron, or any of the members of said board of directors as to the object and purpose of the assessment of one and a half per cent., and twenty per cent. which were respectively levied in April and May, 1873?"

POINTS OF LAW.

I.

The joinder of the claims of Oglesby and Cassard in their reconventional demand was correct.

Art. 374 of the Code of Practice of Louisiana provides: The demand which the defendant institutes in consequence of that which the plaintiff has brought against him is termed a demand in reconvention.

Art. 375. In order to entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be, nevertheless, necessarily connected with, and incidental to the same; as, for instance, the demand instituted by the possessor in good faith against him who sues in order to evict him, or for the purpose of obtaining the payment of the improvements made on the premises.

Provided, That when the plaintiff resides out of the State, or in the State, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action."

And this State practice is recognized in all civil causes in the United States Courts except in equity and admiralty. Revised Stat., §914.

We do not know that we can do better than quote the ruling of Judge Billings in the Circuit Court on this point.

"It is alleged by the defendants in the answer (also stated to be a fact by plaintiff in his petition,) that plaintiff resides out of the State of Louisiana, and that, therefore, he having brought suit under the provisions of the Code, which I have read, they have the right to reconvene, although the causes of action set up in their reconventional demand are separate and not joint.

* * * * * * *

It seems to me that the object of the statute is to be looked at very largely in determining this question.

The statute seems to have sought to give to its citizens the right in case a non-resident sued them to set up by reconvention any cause of action, in order that they might not be driven to go to the domicil of the plaintiff to bring suit, although they could not have set up that cause of action under the ordinary rules of pleading; that is to say, if the plaintiff sues a non-resident.

It seems to me that as suggested in the argument a very safe guide would be to take what the courts of equity have held with reference to judgments, and a line of decisions which I once had occasion to examine, refreshes my memory upon the question—that upon the whole it does not make any difference as to whether the judgments are held by a party jointly or severally. That a party who has a judgment against him may set off the judgment, notwithstanding the fact that others are connected, either as plaintiff or defendant in the judgment.

Graves vs. Woodbury, 4 Hill.

Simpson vs. Hart, 14 Johnson, which refers Bullers Nisi Prius; Durnford & East, vol. 4, p. 122.

It seems to me that the principles upon which these courts have determined, that after demands have ripened into judgments they should be off set, was the principles arrived at by our Legislature in making this departure from the ordinary rules of pleading in the case of a non-resident plaintiff. I do not know that I could get any better guide than that."

The joinder of the actions by Oglesby and Cassard results from the manner in which Attrill brought his suit. The right of reconvention under the Code is plain. Can he then by cumulating his cause of action, and praying judgment *in solido* nullify the Code and oust the Court of jurisdiction as against himself? Surely not.

II.

The action of the Court in referring the plea of prescription to the merits was also correct.

This being an action at law the rules of pleading in the highest court of the State control. Uuder that system no written pleading would be interposed to the plea of prescription, Code of Practice, Art. 329, Stewart vs. Kahn, 11 Wallace, 501, but the party against whom the plea is urged may reply by proofs. Blake vs. Bredall, 15 Louisiana, 552.

In the Succession of Crozat, 12 Annual, the Court held: "Even supposing that under the circumstances of this case prescription could be successfully pleaded, yet the party ought to have an opportunity of showing that the course of prescription was arrested, if such was the case by some one of the modes pointed out by the law. This part of the tableau must be sent back for further action in the lower Court.

III.

The judgment on the verdict of the jury which found "that the reconventional demand of defendants should be dismissed," should have been a judgment of *non-suit*, and not an absolute judgment against plaintiff in error, as was rendered, page 19. If the Court itself had found that the reconventional demand should be dismissed, and had so decreed, even with the payment of costs, it would not have had the force of the thing adjudged, and would only have been a judgment of non-suit.

In Fisk vs. Parker, Sheriff, 14 A. (old print, p. 491, new print, 496,) the Court held:

"Upon these pleadings, the judgment of the Court was that the intervention of F. M. Fisk be *dismissed, and that he pay the costs of intervention.* This judgment did not determine the rights of the parties, but was one of dismissal, or non-suit, and cannot support the plea of *res adjudicata*, Bandin vs. Roleff, 1

N. S., 165. Nor will the reasoning and opinion of the Court upon a subject, on the evidence adduced before it, have the force and effect of the thing adjudged, unless the subject matter be definitely disposed by the decree. Pepper vs. Dunlap, 5 An. p. 209 See also Clay vs. His Creditors, 9 Martin, 519; Succession of W. A. Andrew, 16 An. 197; C. A. Darby vs. Millie, 645; Same Berdsale vs. Lakey, 646; Same Marsh & Compton vs. Perry, 669.

IV.

The action of the Court, in referring the plea of no cause of action (p. 16,) to the merits was also correct.

As we understand this point, it is that Oglesby and Cassard, having, when sued, to enforce the assessments against them, consented to transfer their stock, across the face of which was written "The Crescent City Gas Light Company, accepts and assents to the transfer of 3,555 shares of said stock in said company, made by Jos. H. Oglesby, upon which only fifty cents per share has been paid, and releases him from all past, present and future assessments that are made, or may be made on said stock, and accepts ———————— in place of said Oglesby for all such payments, past and present liability."

(The endorsement on Cassard's stock being the same), and said suits having been discontinued, and they relieved, and some unknown person substituted, that the transaction was of such a nature as to be a settlement and compromise of these respective rights now claimed in this suit, and must stand until set aside.

Now, what compromise is here contended for?

Is it contended, there was any compromise between Attrill on one side and Oglesby and Cassard on the other? Certainly not. When these false and fraudulent assessments were made, and Oglesby and Cassard sued thereon, they consented that their stock should be sold to ———————— (for his name was unknown,

until it was disclosed by Attrill in this suit against Oglesby and Cassard, and the company consented to accept said ———— in the place and stead of said Oglesby and Cassard. It was *no compromise between any of the parties to this suit*, (if compromise it may be called,) and it can be no impediment to an action by Oglesby and Cassard against Attrill.

The only thing that was susceptible of compromise was the assessment, but that remains undisturbed, and the purchaser of the stock, the ———— steps into Oglesby's and Cassard's shoes and owes the assessment, that is would have owe them if they were real.

In no sense could this transaction be considered as a compromise, and the doctrine that accord and satisfaction with one tort-feasor is a satisfaction with all has no application here. There was no accord and satisfaction of the amount due under the assessment.

The claim of Oglesby and Cassard is for the value of their stock, of which they were deprived by fraud. Has this claim been settled by Oglesby and Cassard with any one of these conspirators? Certainly not. If such accord and satisfaction had been made there might be some force in the position.

The doctrine laid down in 3 W., p. 1, is as follows:

A judgment against one joint tresspasser is no bar to an action against another for the same trespass. Nothing short of full satisfaction or that which the law must consider as such can make such judgment a bar.

Where a release by one of several joint and several debtors has been executed, and those not parties to it, claim *the benefit*, thereof the burden is upon them of showing that the instrument was such as barred an action against all. Bolen vs. Crosby, 49 N. Y. 183; Bell vs. Perry, 43 Iowa, 368. See note to Legott vs. Great N. Railway Co., 17 Moak's Notes, pp. 246-7.

There was no judgment against any tort-feasor, nor any com-

promise of any wrong complained of. At the time that plaintiff in error transferred their stock to ——— they knew nothing of the combination to defraud them, of the conspiracy between the board of directors and Attrill, (and the fact that the board were merely his tools) to deprive them of their stock. How, then, can it be said that they compromised a tort of wrong, of which they had no knowledge.

Moreover, it has been decided in this Court, that where a party has parted with his property through fraud and deceit, he may ratify the transaction and sue for damages. United States vs. Fennemore, 3 Dallas, 357.

The conclusion of Judge Billings was correct, and his reasons were as follows:

"At the argument the point was pressed, not that the substance of reconventional demand was not good, but that there were admissions in the answer, and in the pleadings setting up the reconventional demand, which would avoid it, and the first was that the pleadings admit that at the time they sold the stock to Phipps, the defendants knew all the facts, which are relied upon by them as constituting the fraud and deceit; but that they did not know that Attrill was the real party concerned in it, and their believing the matter was as it purported to be, and that they would be left in the hands of the utterly irresponsible parties, who constituted the directory, they made the settlement or compromise and transferred their stock and received the price of it, which was equal to an assessment of one and one-half per cent., and accepted from the corporation, a stipulation that they should not be liable for no further assessments for the unpaid stock.

The allegation then in substance is, that Attrill had been guilty of a fraud, now known te be his, but which having been perpetrated through others, his connection with whom was concealed they made a compromise; but had they known that

Attrill, who was the real party, as they now aver, to the fraud, and who was to be benefitted by it, occupied the situation which he really did occupy, they never would have settled or compromised. According to the averments of the reconventional demand it was a material fact whether the directors were the real parties in making this assessment or whether Attrill's connection with the matter was concealed from them.

It seems to me that there was a concealment of a material fact, and that upon its discovery the defendants had a right to claim redress for whatever wrong they had suffered from the party, who, as they now allege, had really caused the same, or whose connection with it had been concealed from them.

It is alleged in the reconventional demand that the persons who assumed to act as directors never were directors. I think the authorities cited by the plaintiffs counsel show that matters cannot be enquired into collaterally and as the pleadings stands the corporation did lend itself to the perpetration of the alleged fraud. But I am not satisfied that the cause of action which was settled or compromised with the corporation is the same with that presented in this counter claim or reconventional demand.

The simple question presented there was whether the defendants should convey their stock to Phipps, and receive a release from further assessments. The matter of the assessment was compromised but it left the defendants fully vested with whatever rights of action they had against Attrill, the plaintiff, should be (the matter of assessment was not compromised and it left the defendant, etc.)

In 1 Metcalf, 557, Stephens vs Austin, bears a strong resemblance in principle to this case. In that case A. obtained the goods of B. by misrepresentation and fraud, and sold them to C., who had knowledge of such fraud. B. received the promissory note of A. for the goods at the time of the sale, and it was

held that B. might maintain an action of trover for the goods against C. without restoring the note to A.

The reasoning of the Court in that case is upon the ground that though the causes of action sprung out of the same transaction they were essentially different, and, therefore, that the transaction between A. and B. was so far as C. was concerned, was RES INTER ALIOS. Civil Code art 2286, 3078
White vs James 29 Ann 772

It seems to me that two propositions dispose of the question:

1st. That fraud vitiates a contract whether it be in the nature of a compromise or not, and if Attrill himself had obtained the compromise and had thereto concealed a natural fact fraudulently that that compromise itself would be no bar to a suit against him.

2d. That the compromise which Attrill himself effected by the means of concealing his own interests in it, the fact that he was the real party to it, if effected in the name of and through a third person can have no greater effect than one which he had effected himself.

My conclusion, therefore, is that the compromise with the corporation through its directors, if proved to have been effected under the circumstances alleged in the reconventional demand would not defeat that demand.

Lastly: I have examined with a great deal of care the question as to whether it was not necessary in this case for the defendants to have made a tender to Attril of the amount received from Phipps before they instituted this suit by way of reconventional demand. I think the money should be treated as having been paid by Attrill, and if this claim was in the nature of a claim to rescind a contract it would be fatal to it. But I think the action for damages for deceit in the sale of property it is not necessary to offer to return the property.

it is otherwise if the buyer disaffirms the contract and sues for the price paid.

Bacon vs. Brown, 4th Bibb, p. 61; Fennemore vs. United States, 3 Dallas, 357.

V.

As the questions raised by the second and third assignments of error, Rec. pp. 23 and 25, are of the same nature and effect, to-wit: the character of the action set forth and the prescription, bearing thereon, they will be considered together.

The first question to determine is, what the cause of action as set up in the reconventional demand is, for if it be a suit for damages as stated in the charge to the jury, the prescription as stated was correct.

In the solution of this question it may be well to refer to the Code of Practice, under the head "of the various kinds of personal actions."

"Art. 28. Personal actions are grounded on one of the four causes which give rise to personal obligations. The causes are contracts, or quasi contracts, offences, or quasi offences."

"Art. 29. Personal actions arise from contracts where one has bound himself for his own advantage, as by *selling, purchasing, hireing or letting*, or by any like contracts."

"Art. 30. Personal actions arise from quasi contracts, where they are grounded on the obligations imposed on him who has managed the affairs of another without being authorized."

"Art. 31. Personal actions arise from offences where one has become liable to another for the injury he has inflicted on him by some crime or offence, such as theft or slander."

"Art. 32. Personal actions arise from *quasi* offences where the ground of action is the *injury* done to another by one of those faults which are not considered as real crimes or offences."

It is clear from these provisions, that the damages claimed by plaintiffs in error, do not arise from quasi contracts or from offences. Do they arise from a quasi offence? Because, if not, they must arise from the breach of the obligations of the contract of sale.

If they arise from a quasi offence it must be from one of those faults which cannot be considered as a real crime or offence. .

To illustrate: When a man drives his cart into another man's carriage with intent to injure or destroy it, it is an offence, but if that horse runs away with the cart and comes in collision with another man's carriage, it is a quasi offence.

If I intentionally whip a man with a whip, it is an offence, but if I undertake to whip my horse, and by accident my whip lash strikes a man in the eye standing near it, is a quasi offence.

If I undertake to shoot a bird and miss him, and by accident shoot a person who may be in the vicinity, it is a quasi offence.

Offences are punishable criminally, beside giving a remedy for damages *ex delicto*, while quasi offences are not, but can be satisfied only by a suit for damages *ex delicto*.

There is one broad distinction that runs through all these cases for damages, and it is this: In cases of offences and quasi offences the damages result from the violations of no obligations or contracts existing between the parties, while the damages from the violations of contracts do so result. In the one case there are no relations existing between the parties, no dealings or bargainings whatever, and in the other there are such relations.

This distinction will be found to run through all the cases decided by the Supreme Court of Louisiana.

In Edwards vs. Turner, 6 Rob. 382, it was held: "An action for damages by the owner of property attached in a suit against another person is prescribrd by one year from the seizure."

In Auty vs. Adle, 9 A. 490, it was held: "The illegal seizure and sale of plaintiff's property by defendant, who, himself the purchaser, has enjoyed its revenues, is a quasi offence prescribed by one year."

In Harper vs. Municipality No. 1, 12 A. 346, it was held: "An action for the illegal destruction of a railroad and conversion of the iron and other materials to one's own use is one for tort prescribed by one year."

In Foley vs. Bush, 13 A. 126, where plaintiff sued to recover the value of wood cut on his land by the defendant, it was held that the action was prescribed as to damages resulting from a trespass which had been committed more than one year previous to the institution of the suit.

So in Harris vs. N. O., Op. and G. W. R. R. Co., 16 A. 140: "The principal demand was for $290, the alleged value of a horse which was killed by the locomotive of the company. The killing was admitted, but attributable to unavoidable force, and the amount claimed in reconvention $1,500, is to cover damages caused to the cars, track, etc., by the collision.

To this plea in reconvention plaintiff opposed the prescription of one year; and it appears from the pleadings and evidence that the reconventional demand was made some sixteen months after the collision. "The plea of prescription must, therefor, be sustained."

So in Williams vs. Greiner, 20 A. 151, which was a suit by plaintiff for the value of sugar and corn taken and carried away from the plaintiff's plantation without his consent and appropriated by the defendant, to his own use, it was prescribed in one year."

And in Millspaugh vs. New Orleans, 20 A. 323, which was a claim by plaintiff against the defendant for ballast wrongfully taken by the city and used in paving the streets, it was held to be a quasi offence and prescribed by one year.

And in Burch vs. Willis, 21 A. 462, which was a suit to recover $9.975, as the value of 50 bales of cotton, which it was alleged defendant "took and appropriated to his own use and benefit, without any right, title or legal claim whatever, in the summer or fall of 1865," it was held to be a quasi offence prescribed by one year.

So in Wood vs. Harespe, 26 A. 511, which was a suit for the wrongful taking possession of plaintiff's property by defendant's agent, and the shipping of it for his account, and it was held the property came into his hands by reason of an offence, which he, through his agent, has committed, and the claim was prescribed by one year.

And in Norman vs. Edwards, 23 A. 142, which was a suit on an open account by plaintiff, and defendant pleaded general issue and set up a claim of $1,520.80 in *compensation*, and asked for a judgment for that amount. The claim of defendant against the plaintiff was for cotton wrongfully taken by plaintiff sent to New Orleans and sold by him. Plaintiff in reconvention *ratified* the wrongful act of plaintiff by suing for the value of the property, and the Court held this ratification would take the claim out of prescription of one year.

In all of the forgoing cases and others that might be cited, it will appear there was no pre-existing relations between the parties whatever, no bargainings or transactions of any kind, and by the following cases it will be observed, that where damages are claimed and there had been any prior relations, bargainings or dealings, the courts have invariably held said damages to be claimed *ex contractu* and the prescription of ten years to govern.

In Palmer vs. Smith, 9 Rob. 396 and Maggoffin vs. Cowan, 11 A. 554, it was held: "The prescription of one year does not apply to an action against the consignee of a ship, for damages for a failure to comply with their obligations as such. Their liability is *ex contractu* not *ex delicto*. So, too, of an action by

the principal against his factor for a loss in the sale of property occasioned by the latter's disobedience of orders."

So in Thompson vs. Lobdell, 7 R. 369, where through the *laches* of an attorney-at-law in filing an improper account putting down amounts in excess of what was due, and neglecting to correct the same in time, and thereafter allowing the same to be homologated when the administrator was called upon to pay more than was due; upon being sued for the recovery of this amount the attorney interposed the plea of prescription of one year, alleging that he was charged with a *quasi offence*. The Court held the plea not good.

In the case of Pickerell vs. Fisk, 13 A. p. 277, where a steamboat had been bought on speculation, and not to be engaged in trade, the proprietors being joint owners and not partners, and one of the joint owners having sent the vessel to sea, and she was lost, upon suit being brought for the value of the share, and the plea of prescription of one year being interposed, the Court held the same bad and declared: "It is not an action to recover damages resulting from an offence or a quasi offence, but one for the recovery of the value of property of the succession for which the defendent has made himself liable."

In the case of Perrillat vs. Peuch, 2 Louisiana, page 428, the case is stated as follows: "The object of this suit was to compel the defendant to refund money, which the plaintiff alleged he had paid him at a usurious rate of interest. The defendant excepted to the petition, on several grounds which are stated in the opinion of the Court."

One of those pleas was: "The prescription of one year as established by the 3,501st and 3,503d, (now 3,536 and 3,538) Article of the Louisiana Code."

The Court below sustained this exception and there was an appeal.

The Supreme Court declared: "The judge of the first instance was of opinion that this action was barred by the 3,501st Article of our Code in relation to quasi offences; we are unable to agree with him. The injury complained of in the petition arose out of a contract. *Quasi* offences are those by which an injury is done *independent of an agreement.*

The 3,503d Article relied on in the answer, provides for cases quite different from the present. The demand here is neither for the arrearages of rent charges, annuities, and alimony, or for the hire of immovables or movables, or for money lent; it is for the *repayment of money obtained under an unlawful agreement.*

The case of Lalland vs. Ball, 20 A. 194, is directly in point. That was a suit on a promissory note, drawn by defendant, and representing a part of the price of a tract of land. There was a general denial and a claim in *reconvention for* $10,000 *damages*, claimed by defendant as having been sustained by him in consequence of *fraudulent misrepresentations* of the plaintiff, who was the vendor, and who led the defendant to believe that it was partly composed of swamp lands, and that it was bounded by the Mississippi River, and which was the inducement to the defendant for the purchase of the land.

Among other pleas, plaintiff plead that the reconventional demand was barred by the prescription of one year.

The Court in passing on the plea, said: "The Court below properly disregarded the plea of prescription which does not apply to damages *ex contractu.*

Some of the cases on this point, were examined by this Court in Casey vs. The Bank, 100 U. S., page 446, and we ask the Court's attention to them.

The reconventional demand here is for the value of property fraudulently procured by defendant in error, but in a contract of sale, and is not a claim for damages *ex delicto.*

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Attrill nowhere pretends that he took this stock secretly or clandestinely, nor do Oglesby and Cassard charge that Attrill stole it. Attrill says they sold it, and they also say they sold it. This being true, where is the tort, the *quasi offence* contended for on the other side? If the fraudulent representation that was made to bring about the sale is a *qvasi offence*, then the above cases are all wrong.

Suppose the suit was for the recovery of the identical stock, in shares and numbers, out of which Oglesby and Cassard had been swindled, would that action be prescribed by one year? Certainly not. Now suppose the stock has been so far parted with and changed that we cannot get the stock, and suit is brought for its value, does that fact make the action *ex delicto?* Certainly not.

The fact of the fraud practiced does not determine the character of the action because fraud would be the ingredient in both actions.

We repeat, then, that this is a suit for damages resulting from a contract of sale, and for the purpose of putting this question beyond all doubt, we will call the Court's attention to the obligations that flow from such a contract.

If it be objected that there is nothing in the Code under the head of contract of sale covering the case under consideration, we answer:

"Art. 2,438 provides in all cases where no special provision is made under the present title, the contract of sale is subjected to the general rules established under the title of conventional obligations."

"Art. 2439. The contract of sale is an agreement by which one gives a thing for a fair price in order to have the thing itself."

Three ingredients are necessary to the perfection of the contract, to-wit: *the thing sold, the price, and the consent,* "and by

Article 1,819 we are informed, consent, being the concurrence of intention in two or more persons, with regard to a matter understood by all *reciprocally communicated*, and resulting *in each party from a free and deliberate* exercise of the will, it follows that there is no consent, not only where the intent has not been *mutually communicated*, or implied, as is provided in the foregoing paragraph, but also when it has been proceeded by error, fraud, violence and threats."

Thereupon, turning to Chapter VIII of the nullity resulting from fraud, we find that Art. 1,847, provides:

Fraud, as applied to *contracts* (and here we ask the Court's special attention to the word contracts) is the cause of an error bearing on a material part of the contract, created or continued by artifice, with the design to obtain some unjust advantage to one party, or to cause an inconvenience or loss to the others.

From which are drawn the following rules: No. 5. "It must be caused or continued by artifice, by which is meant either an assertion of what is false or a suppression of what is true, in relation to such a part of the contract as stated in the second rule."

* * * * * * *

"7. The artifice must be designed to obtain either an unjust advantage to one party, for whose benefit the artifice is carried on, or a loss or incouvenience to him against whom it is practiced, although attended with advantage to no one."

"10. In the words loss or inconvenience, which may be suffered by the party is included, the *preventing* him from obtaining any gain or advantage which, without artifice, he might have obtained."

"12. Combinations with respect to sales to enhance the price by false bids or offers, or to depress it by false assertions, are *artifices* which invalidate the contract, when practiced by those who are parties to it, or give rise to an action for damages where they are not."

From all of which it will appear that the obligations of buyer and seller are mutual and reciprocal—that there must be the utmost fairness on both sides, and any want thereof on either side is a violation of the foregoing articles of the Code, and gives a remedy therefore *ex contractu*—that is, if the seller holds out to the purchaser false representations as to the thing sold, the purchaser may recover damages *ex contractu*.

Now, if the purchaser is guilty of false representations to induce the seller to sell, is not suit for damages arising therefrom equally *ex contractu?* If not, there is one law for the seller and another for the purchaser.

Again, as we understood the counsel for Attrill in the lower Court, his claim was this: That the claim made in the reconventional demand is one for damages resulting in the loss of the stock of Oglesby and Cassard, or its value, consequent on a fraudulent conspiracy entered into by Attrill and the board of directors, who are alleged to be his instruments. So that if the allegations be true, it sets forth a cause of action against Attrill, each member of the board and against the corporation which perpetrated the fraud through its officers, or in other words, Attrill was the board of directors, and their relation and connection with plaintiffs in reconvention, the same as that of said directors.

If this be a correct statement of the case the question arises, what prescription applies? Certainly not the prescription of one year.

In the case of Percy vs. White, 7 Rob. 513, it was held in an *action by stockholders against directors of a bank* for damages for

losses sustained through their negligence, fraud or mismanagement, that the prescription of ten years prevailed.

In that case the allegations in the petition "charged the defendants with fraud and negligence in the discharge of their duties as directors, whereby the institution was ruined and the stock lost, and *the prayer of the petition was* that certain persons might be made *parties beside those charged* as directors, and that the directors may be *condemned to pay damages* for their misconduct and negligence."

The Court said further: "It is to be observed that as to the parties sued as directors this is essentially an action for damages against certain directors for negligence, *fraud* and mismanagement, as the agents of the bank, and of the plaintiffs as stockholders. They are charged as wrong-doers and unfaithful agents, *and the damages asked for as an indemnity to those who have been injured.*"

As between the parties before us this is an action for damages *ex contractu* against mandatories.

The Court held the action was prescribed by ten years, on the authority of Percy vs. Millaudon, 3 La. 591.

VI.

The Fourth and Ninth Assignment go to the same point, to-wit: the measurement of damages, and will be considered together. Rec. pp. 27 and 39.

It was proved on the trial, that Attrill received for each share of the Oglesby and Cassard stock $41.66\frac{2}{3}$, in April, 1875, and previous to any of the proceedings in this case, and that being undisputed, the Court was requested to instruct the jury as in the Fourth and Ninth Assignments of Error set forth.

These requests were clearly correct. In Louisiana the measure of damages is laid down in the Civil Code.

Herron, referred to in the fifth assignment of error. Record, pp. 29 and 30.

The reconventional demand by Oglesby was for the stock of which he had been defrauded by Attrill as his tools. The petition of Attrill declared Oglesby was not entitled to this stock or its value, because *he had sold it to* Phipps, who had transferred to Attrill.

Attrill clearly could not be permitted to dispute Oglesby's title, or ownership.

If Oglesby had not paid for this stock no oral evidence should have been admitted to show that the *books showed* said non-payment, when the loss of the books was not shown.

The evidence was both illegal and immatured, and should not have been admitted.

In Lucas vs. Brooks, 18 Wallace, p. 454, this Court said: "A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence."

VIII.

Equally improper was the admission of the evidence of said Herron, referred to in the seventh assignment, pp. 33 and 34, to show a different object of the said assessment from that expressed on its face.

The avowed object of the assessment of 1½ per cent. and the suit instituted for the recovery of the same and of the other assessments up to the par value, was to raise money to purchase real estate for the location of the works and other buildings of the Crescent City Gas Light Company. No other object was assigned during the time of Oglesby and Cassard held their stock, neithsr in the resolutions themselves, or in any suits

thereon, or in any of the declarations of the directors. The board was not responsible. There was on hand at the time in the treasury in cash $7,250, and there were no debts.

The legal contest to establish the charter of the Crescent City Gas Light Company as against the New Orleans Gas Company was pending before the courts long prior to Attrill's becoming interested in the company, and to his putttng his directors into office. The money in the treasury had been put there by the prior stockholders, among other purposes for defraying the expenses of this very litigation, and for that purpose they are willing to contribute at all times in the future. Now, was it not a deceit and a fraud of the stockholders to conceal the purpose of said assessment? Can Attrill now be heard to say we had a different object, and you should have held on to your stock and paid the assessments. We did not mean what we said in the assesment, and in the suit we brought against you to enforce them. Can Attrill be allowed to say this, in the face of that assessment and suits and other other threatened assessments, up to the par value of the stock? Certainly not, and the evidence should never have been admitted.

IX.

The questions raised by the sixth and eighth assignments of error may be considered together. Rec., pp. 32 and 36.

It would be strange indeed if none but the author of fraud or a conspiracy to defraud could be held liable therefor civily or criminally. Yet such is the clear import of the instructions given to the jury, for in the one case it is stated, the plaintiff must be the author of the fraud, p. 36, and in the other, that it (the fraud) must have been done by the procurement of the plaintiff, in his interests and by his agents, p. 32.

In Mason vs. Crosby, 1st Wood & M., page 358, the Court said:

"Under these circumstances (that of the principal receiving the fruits of the fraudulent acts of his agent), it has boen settled in the case of Doggett vs. Emerson, 3d Story, 700, that owners cannot take the benefit of acts or negotiations like those of Tiefield, without bearing the burden of them, or any liabilities growing out of them, on account of any falsehoods of frauds of his that accompanied them and were material to the sale."

* * * * *

Same page: "So it is settled then, that thə owners need not have known the falsity or fraud in order to be charged with its civil consequences, if they undertake to receive the benefit of the contract made under it."

So also in Foster vs. Swasey, 2 Wood & Min. 222, the Court saids.

"For, * * * it is well settled that if an agent, in making a sale of an article, commits a fraud or states a falsehood as to material facts which are relied on, it exposes the sale to be avoided."

"The theory is not, in such a case, that he binds his employer by any engagement which he is not empowered to make, but that his employer cannot take the benefit of his sales without taking the burden of them, and that he must repudiate the whole, and not merely a part, where all was dependent and united. That if he does not choose to ratify the whole, he must ratify nothing connected and interwoven; and that the fraud or falsehood, if bad at all, is bad for the whole, and restores the parties to the condition in which they stood before it happened." Doggett vs. Emerson, 3 Story, R. 700; Mason et al. vs. Crosby et al., 1 Wood & Min. 342."

"The employer of an unfaithful agent is to suffer by his misconduct generally, rather than his victim. Hence, in this case,

if the agent did at the sale *what he was not authorized* to do, and its amounts to a falsehood or fraud, and the defendant repudiates it, he must repudiate the matter or engagement to which it related, and restore things to the position in which they otherwise have stood."

X.

As to the error assigned, under the tenth bill of exceptions, Record, pp. 40 to 43.

It is clear, the object, intent and purpose of the assessments and suits, and threatened assessments up to the par value of the stock was concealed from Oglesby and Cassard by Attrill and his board of directors; the allegation being the money was needed to build works. And so complete and effective was said concealment that not even Harris, their broker, was permitted by Wibray or any of the board to know for whom he was purchasing, or that the purchases were made for Attrill, who furnished the money to pay for the stock, nor were Oglesby and Cassard permitted to know who the purchaser of their stock was, (they having been compelled to transfer the same in blank without being permitted to know the purchaser,) until the name of said purchaser was declared in the suit brought against them by Attrill, wherein said purchaser was declared to be Phipps, page 3.

The very document which they set up as a compromise and a bar to the reconventional demand, p. 3, shows the purchaser to be a blank.

Surely, under these circumstances prescription could not begin to run until the fraud was discovered, by the plaintiffs in reconvention. See Bailey's Assignee vs. Glover, Wall 21, p. 349.

But the instruction of the Court is that prescription would only cease to run as long as Attrill maintained his concealment.

If by this is meant that prescription would run from the date Attrill disclosed his fraud to the plaintiffs in error, it would be undoubtedly correct, but it does not say so. He may have thrown off the cloak far away from New Orleans, say in Baltimore, where he then resided, but surely the unveiling of his real character and transactions, where Oglesby and Cassard could and would in all probability know nothing of it, could not avail him. Hence, we say, and on the authority above referred to, that prescription in this case could only begin to run from the time the fraud was discovered. See Bailey vs. Glover, 21 Wallace, 349.

XI.

The question put to the witness Oglesby, as set forth in the eleventh assignment of error, based on the eleventh exception, p. 43, was most clearly proper.

That question sought the knowledge of the witness as to the character of the assessments, whether they were true or false, and the objection was on the ground that the inquiry sought a mere matter of opinion, and on this ground the Court directed the witness not to answer. There was no objection to the form of the question, and indeed there could be none, as the question did not suggest an answer to the witness.

How this question could be disallowed on the ground that it sought the opinion of the witness, when it asked for actual knowledge, is hard to understand.

XII.

The action of the Court in the rejection of the evidence of Alexander Walker, as set forth in the twelfth and thirteenth as-

signment of error, and the exceptions on which the same are based (pp. 44 to 47 and 47 to 50), was most clearly wrong, and especially as set forth in the latter bill of exceptions.

Walker was the principal witness of plaintiffs in reconvention in the lower Court, and the purpose for which he was offered, was most material and pertinent to the inquiry in the case.

His preliminary evidence is conclusively to the effect that he was only the counsel of the company, in which Attrill was a large stockholder; that he never had been counsel for the company in reference to the assessments, and did not even know that suits were brought for the enforcement of the same, and that Attrill had never spoken to him about said assessments. Now how his evidence could be rejected on the ground of privileged communications it is hard to conceive. That he had never been the company's attorney and counsel in reference to the assessments is clear. That he had never been Attrill's attorney and counsel in reference to the same is equally clear. How then could anything that he might know in reference to these assessments be privileged.

Suppose that he had been the attorney of the Company, which certainly is the most that could be contended, (and he says that his employment was not general but special), and that he knew the real object of the aasessments that were passed by the Company. Attrill was a stockholder in that Company, and so were Oglesby and Cassard. The Directors were the trustees and agents of all the stockholders. Can anything which is in the counsel of the common concern be privileged in favor of one stockholder as against another: or in other words, can the counsel of a firm or partnership receive a communication from one partner concerning that partnership which is privileged as to the other partner."

The proposition need but be stated and it answers itself.

In Patten vs. Moore, 9 Foster, 163, it was held:

"Facts coming to the knowledge of counsel, without communication from their clients by being present merely when a legal document is executed, are not privileged."

"So communications made by the trustee to counsel, in regard to the trust, are not privileged from being proved by counsel in a suit between the *cestui que trust* and the trustee affecting the trust."

Sheehan vs. Phillips, 1 Foster & Fenlason, Reports 449. Nisi Prius Cases on Crown side. Earle vs Grant 4 & Vt 113
Marsh vs Howe 36 Barb 656, Rochester BK vs Suy daw 5 HP 261
Halson vs Robins 14 Pick 422, Grover vs Emery 18 Maine 52
Satterlee vs Blair 26 Cal 490 XIII Hagar vs Schmidt 29 Cal 65

X Anticipating the argument of the defendant in error, that in levying the assessment of 1½ per cent. and twenty per cent. on the capital of this Company was the exercise of a lawful authority vested in them, and that their purpose in levying the same cannot be reviewed, we answer: that directors are the "trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon general principles of equity, be suffered to pass without a remedy. Angel & Ames, on Corporations, edition of 1861, Sec. 312.

Koehler vs. Black River Falls Iron Co., 2 Black, 715; also, Upton, assignee vs. Triblecock, 91 U. S. R. 45, where the Court says at page 47:

"It, (the capital stock) is a trust fund of which the directors are the trustees. It is a trust to be managed for the *benefit of the shareholders* during its life, and for the benefit of its creditors in the event of its dissolution. This duty is s sacred one and cannot be disregarded. Its violation will not be undertaken by any just minded man, and will not be permitted by the Courts.

X Follett vs Jeffery 1 Sui N S 3
Cooney vs Tatchell 1 Hill R 33
Gartside vs Outram 26 L J US 113
Russell vs Jackson 9 How 390

The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention."

To the same point is the decision in the Wardell vs. Railroad Company, 103 U. S. R., p. 651. See 33 N. Y., page 1. State of Michigan vs Phoenix Bank
. The directors were but the instruments of Attrill, and he is responsible and accountable for the fruits derived from their fraudulent acts.

Respectfully submitted,

RICHARD DEGRAY,

A. B. Singleton

A. H. Brown

Attorneys for Plaintiff in Error.

Johnson vs Fonsley 13 Wall 72
Peabody vs Flint 6 Allen 52
Jackson vs Ludeling 21 Wall 617
Fisher vs Budlong 10 R I 525
Smith vs Commonwealth 30 Ky. 655, 670 681
Dillon on Mun Corp 3 Ed Sec 94, 794 9
Field on Corporations Sec 171. 172 175 795
Hills vs Parish 14 N J Eq 380
Spearing's appeal 71 Pa State 11
Inc Aleister vs Kuhn 96 US 87

APR 10 1882

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

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PLAINTIFFS IN ERROR.

versus

HENRY Y. ATTRILL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR EASTERN DISTRICT OF LOUISIANA.

ARGUMENT OF HENRY B. KELLY, OF COUNSEL FOR PLAINTIFFS IN ERROR, IN REPLY.

HENRY B. KELLY,
Of Counsel for Plaintiffs in Error.

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ARGUMENT OF HENRY B. KELLY, OF COUNSEL FOR PLAINTIFFS IN ERROR, IN REPLY.

By section four of Act No. 97 of 1870 (Acts of 1870, p. 216), entitled, "An Act to incorporate the Crescent City Gas Light Company," it was enacted that the works and affairs of the company should be managed and conducted by a Board of Directors; and by the third section it was provided that no one should be elected a director who was not a resident of the State of Louisiana, and the owner of one hundred shares of the stock; which by section second was fixed at three million dollars, to be divided into thirty thousand shares of one hundred dollars each; and by section five it was enacted that if any director should cease to be a stockholder, his office

should be declared vacant, and the vacancy be filled for the remainder of the term by such person as the remaining directors should appoint.

By reference to the first section it will be seen that Joseph H. Oglesby was one of the original corporators.

By Act No. 106, of 1873, published with the acts of 1874, p. 5, to amend and re-enact the original act of incorporation, of April 20, 1870, it was, by the first section, enacted that the original act should be so amended, that the Board of Directors of the corporation should be authorized to determine by by-laws the number of which the board should consist, which number should be not less than three nor more than nine, and that any person who was the owner of ten shares of stock might be a director. The provision of the original charter vacating the office when the director ceased to be a stockholder, was not changed by the amendatory act.

By Act No. 158, of 1874, approved on the 12th of December of that year, and to be found at page 16 of the Acts of 1875, not having been signed by the Governor in time to be bound with the Acts of 1874, it was enacted, that any two business or manufacturing corporations then existing under general or special law, whose objects and business were in general of the same nature, might unite, amalgamate and consolidate, and form one consolidated company, holding and enjoying all the rights, franchises and property belonging to each, under such corporate name as they might agree upon; and that such consolidation should be made by agreement in writing "by or under the authority *of the Board of Directors*, and the assent of the owners of at least three-fifths of the stock of each of said corporations."

Such being the charter of the Crescent City Gas Light Company, and the law of Louisiana on the subject of consolidation of corporations, on the 12th of April, 1875, Henry Y. Attrill, defendant in error, filed in the Fourth District Court for the Parish of Orleans, the original petition in this litigation.

The substance of the averments of the petition material to be stated here is: that having become *sole owner of the stock* of the Crescent City Gas Light Company, amount-

ing to three million of dollars divided into thirty thousand shares of one hundred dollars, *he*, in the month of March, 1875, entered into negotiations with the New Orleans Gas Light Company, for an amalgamation of the two companies, under the act of December 12, 1874; that said negotiations resulted in an agreement for amalgamation, entered into in the month of March, 1875, between the companies aforesaid, through their respective *boards of directors* (!) who thereupon convened *meetings* of their respective stockholders, (!!) to be held on the 9th of April, 1875, to assent to said agreement of consolidation, and that meetings were held on the appointed day, and that the requisite number of stockholders gave their formal assent to said agreement on the 9th of April, 1875, and that on the ensuing day the agreement was deposited with the Secretary of State as required by law."

As we have seen, under the charter which was the law of the corporate existence of the Crescent City Gas Light Company, the office of director was vacated by the director ceasing to be a stockholder of the company, and as the averments at the outset of Attrill's petition, and immediately preceding those relating to the proceedings to effect the consolidation of the two companies, expressly allege that at the time of the amalgamation of the two companies Attrill was *the sole owner of all the stock* of the Crescent City Company, it is difficult to perceive how a board of directors of this company could be constituted to consist of not more than nine or less than three members, or how a *meeting* of stockholders could be held.

The averment is made and reiterated in Attrill's petition, that at the time of the transactions referred to there was no other stockholder in the Crescent City Company than himself, all others having been swallowed up by him. Such being the case, the averments, immediately following, of meetings and proceedings of boards of directors and of stockholders, recall to mind—if the levity of the allusion may be pardoned for the sake of its aptness—the yarn of the elderly naval man of the 'Nancy' Brig, who having been cast away in the Indian sea

and compelled to subsist by devouring his shipmates, to the last man, before he was rescued, labored thereafter under the hallucination that he had become, by process of assimilation, a ship's crew within himself, and was wont to recite, in a minor key—

Oh, I am a cook and a captain bold,
And the mate of the 'Nancy' Brig,
And a bos'un tight and a midshipmite,
And the crew of the captain's gig!—

So, it seems to be assumed by Attrill, that he had become, by similar process of assimilation, quite as multitudinous a man; that, by swallowing up all other stockholders, he had become at once, in himself alone, a board of directors, a mass meeting of stockholders and a gas-light company!—

So, the serpent, in ancient fable, by devouring others of its kind, became a dragon.

Serpens, nisi serpentes comederit, non fit draco.

The petition goes on to aver in substance that under the terms of the agreement of consolidation, the consolidated company retained the name of the New Orleans Gas Light Company, and that the full paid capital stock of the consolidated company was fixed at three million seven hundred and fifty thousand dollars divided into thirty-seven thousand five hundred shares of one hundred dollars each, and that "twelve thousand five hundred shares were allotted to *your petitioner as owner of the capital stock of the Crescent City Gas Light Company*, and the residue, twenty-five thousand shares, were allotted to the owners of stock in the New Orleans Gas Light Company. The petition then goes on to aver that on the 10th of April, 1875, about the time of the consummation of the agreement of consolidation, and with the view and object of interposing obstacles in the way of petitioner realizing the benefits of the consolidation, the defendants Oglesby and Cassard, the former representing himself as entitled to three thousand five hundred and fifty shares of stock in the Crescent Gas Light Company, and the latter to eleven hundred and fifty shares of the same stock, united with Joseph Hernandez, in a letter or notice addressed to James Jackson,

President, and the directors of the New Orleans Gas Light Company, in words and figures following, viz:

"NEW ORLEANS, April 10, 1875.

James Jackson, President Gas Company:

"By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Light Company. We, the undersigned, hereby notify you that at the commencement of the litigation with your company we were owners of the shares of the Crescent City Gas Company attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of said company, and that we intend to prosecute our claim to the same, and hereby notify you that any compromise or adjustment you may make with said Crescent City Gas Company will be subject to our rights to the extent above stated and that legal proceedings will be instituted to enforce our rights."

[Signed] J. H. OGLESBY, 3,556 shares,
JULES CASSARD, 1,150 shares,
J. HERNANDEZ, 400 shares.

The petition then avers that the claim made by the defendants was utterly groundless, and that under no circumstances could the defendants have maintained an action against the New Orleans Gas Light Company, and that, hence, the notification contained in the letter was concocted by defendants with the sole view of injuring petitioner and depreciating his stock in the consolidated company.

The petitien then avers that on the 7th of April, 1873, the board of directors of the Crescent Company, as they had a right to do, levied an assessment of one and a half per cent. on the stock of the company, under which Oglesby was bound to pay $6,075, and Cassard $1,725, that when called on they refused to pay the assessment, and on the 6th of May, 1873, instituted in conjunction with other stockholders, a suit to enjoin the collection of assessment upon averments of fraud and machinations of the officers of the company, and that thereupon the company brought suit against Oglesby and Cassard to enforce the payment of it, the said suit being brought on

the 14th of May, 1873. That on the 15th of May, 1873, Cassard transferred his stock to one Phipps; and that on the 22d of May, 1873, Oglesby also transferred his stock to Phipps, and that across the face of the transfer by Oglesby was written at his instance; "the Crescent Gas Light Company accepts and assents to the transfer of 3,350 shares of stock in said company, made by Joseph H. Oglesby, upon which only fifty cents per share has been paid, and releases him from all past, present and future assessments that are made or may be made on said stock and accepts in place of said Oglesby for all such payments past and present liability." That a similar endorsement was written across the transfer of Cassard, and that thereafter the respective suits were dismissed, and that all these matters were done under advice of counsel and by way of settlement and compromise of the rights of the parties.

The petition then avers that by the notification to the New Orleans Gas Company his absolute control of a large amount of his stock in the consolidated company has been impaired, and that the value of the entire number of shares allotted to him has thereby been impaired and depreciated to the extent of two hundred thousand dollars, for which amount he prays for judgment against Oglesby and Cassard *in solido.*

After the filing of the petition, and before answer the suit was removed to the Circuit Court of the United States, on the application of Oglesby and Cassard.

Defendants having been sued together and judgment being prayed for against them together *in solido*, joined in their answer. Transcript 7.

The answer denies that Attrill is the *sole owner of all the stock* of the Crescent Company, and avers that Oglesby and Cassard are entitled respectively, the first to 3550 and the latter to 1150 shares of the stock, of which they aver they were fraudulently deprived by Attrill in the manner specially set forth in the answer, and again in the demand in reconvention.

In the demand in reconvention it is averred, in substance, that the Act of 1835 incorporating the New Orleans Gas light

Company, was by its terms to expire on the first of April, 1875, and that an attempt by the act of 1860 to extend the charter of this company being inoperative in consequence of its unconstitutionality, the Legislature of 1870 incorporated the Crescent City Gas Light Company, and granted to the corporators of that company the exclusive right to make and vend gas in the City of New Orleans, and that the said Oglesby and Cassard and the corporators of the Crescent City Gas Light Company contemplated buying from the city the pipes, gas works and other property to be acquired by the city from the old company, and that it was the design of the corporators until time should develope whether they could purchase from the City of New Orleans, or would be compelled to lay pipes and build gas works for themselves, merely to organize the company, and that the corporation was organized by the election of a Board of Directors in 1870, and that another board was elected in 1871, of which Oglesby was President, and that another board was organized in 1872, of which Cassard was President, and that in 1873 another board was elected of which T. L. Wibray was President. That it having been made known to Attrill that this valuable monopoly had been granted to the Crescent City Gas Light Company, he set to work to obtain possession of the stock that he might control the company, that to that end he combined with a set of men who were completely under his influence, and subject to his control, to put them into the office of directors of the company, and succeeding in putting into office as directors in about 1873, Thos. L. Wibray, Joseph Gran, J. M. Conway, — Phipps and T. J. Herron, that said Board of Directors were not legally elected, and that there has been no Board of Directors legally organized since 1872, and that the acts of subsequent boards have been null and void.

That Attrill confederating with the board of directors put into office by him in 1873, "*induced them to adopt a scheme whereby he could purchase the stock of the Crescent City Gas Light Company for a mere nominal price,*" and that to effect this an assessment of one-and-a-half per cent. was made on the stock, the amount of the assessment against Oglesby being

$6,075, and against Cassard $1,725, and that "the said board of directors to *consummate the designs of said Attrell* threatened to repeat the assessment and to increase it until the entire stock should be paid up." That the board of directors "had made no arrangements to purchase property, to build gas works, or to lay pipes, and they *had no serious designs of doing either, their sole object, being instigated thereto by the plaintiff*, being to induce the share holders to give up their stock for a mere nominal price, *that it might enure to his benefit.*"

That the share holders and especially Oglesby and Cassard remonstrated against these assessments as wanton and lawless but that they were inexorable and insisted upon carrying out their plan, "ALTHOUGH THEY AGREED AMONG THEMSELVES THAT NO ASSESSMENTS OF THEIR STOCK SHOULD BE MADE."

The said Oglesby and Cassard admit that suits were brought against them as alleged, and say that in as much as the assessments made, and threatened to be made, involved the payment by them of enormous sums of money, and in as much as they had just reason to believe that neither of them would derive any benefit therefrom, they were compelled to make the compromise set forth in the petition to prevent their utter ruin; they admit they made the stipulations by which the Crescent City Gas Light Company accepted their stock, but that the stipulations were made in error as to the facts, and that they have ascertained within a year, that Phipps, to whom they transferred the stock, was an agent of Attrill's, "to combine with the other directors as hereinbefore charged, and that but for said error of fact they would have defended the suits brought against them, and would not have surrendered their stock; and they charge that said *Attrill and said board concealed from them the object and design of said assessment*—which object and design are elsewhere averred in the reconventional demand to have been, to depreciate the value to the stock for the purpose of enabling Attrill to become the owner of the stock held by others than himself and his confederates, for a mere nominal price, all other pretence for the levy of such assessments being mere blinds.

They aver that the franchises of the Crescent City Gas Light Company are of great value, worth not less than one hundred dollars for each share thereof; that they were severally entitled to the stock respectively owned by them as aforesaid, that they have been illegally deprived of it by Attrill, and that he has converted it to his own use and that he is accountable to them for the value of their respective stocks, to-wit: to Oglesby, in the amount of $355,000, and to Cassard, in the amount of $11,500, for which they respectfully pray judgment in reconvention against him.

To the demands in reconvention Attrill excepted upon two grounds, one of which it is not deemed necessary to discuss. The other ground was, "that the claims of the plaintiffs in reconvention are prescribed by one year, which prescription the plaintiff in this suit pleads." At the same time a motion was made to strike the demand in reconvention from the files, on the grounds set forth in the exception, and on the further ground that said demand in reconvention "*discloses no cause of action against the plaintiff.*" Trans. 14.

The motion to strike out was disallowed by the Court, and the exception of no cause of action and the plea of prescription were referred to the merits. Trans. 16. There was a trial upon the merits, and a verdict in the following words: "We, the jury, find in favor of the defendants on the demand of the plaintiff, Henry Y. Attrell, and we find that the reconventional demand of the defendants *should be dismissed.*" Trans. 17.

Thereafter, judgment was entered, in the following words: "By reason of the verdict of the jury and *in accordance therewith*, it is ordered, adjudged and decreed that there be judgment for the defendants, on the demand of the plaintiff, Henry Y. Attrill, and that on the reconventional demand *there be judgment for the plaintiff, Attrill, and against the defendants.*" Trans. 19.

From this judgment a writ of error was sued out by Oglesby and Cassard, plaintiffs in reconvention. Trans. 50–51. No writ of error was sued out by Attrill and he cannot be heard

here to assign or allege error to his prejudice in the court below.

The first assignment of error apparent is that the absolute judgment on the reconventional demand in favor of Attrill and against the defendants is not supported by the verdict, which was merely that the reconventional demand should *be dismissed.*

It is not deemed necessary to add anything here to the argument and authorities of Mr. De Gray, at page 18 of his brief, in support of this assignment of error.

Counsel for defendant in error at pages 10 and 11 of his brief, says: "There are two fundamental questions to be discussed either of which will dispose of the case if the views entertained by the defendant in error are correct.

"1. Does the demand in reconvention disclose a cause of action?

"2. If a cause of action is set forth, does not the obligation to repair the injury arise from a tort or delict, or as we term it in Louisiana, an offense or quasi offense, and if so, is it not prescribed by the lapse of one year, which is the term of limitation of such actions in Louisiana?

Before the trial of the cause on its merits, the plaintiff moved to strike out the demand in reconvention, because it disclosed no cause of action. The Court referred that question as well as the plea of prescription to the merits.

It is manifest from the various instructions given or refused that the Court below was of opinion that the demand in reconvention disclosed a legal cause of action, but that it was prescribed by one year as an offense or quasi offense.

Nevertheless, that question must be passed on by this court, for if the defendants in the court below were, under no circumstances entitled to a verdict, it is immaterial what errors the court below may have committed in the progress of the trial. * * * * I proceed then to discuss the question, whether the demand in reconvention discloses a legal cause of action, for the motion to strike out is equivalent to a demurrer.

Of course the demurrer admits only such facts as are well pleaded and it is not a confession of general allegations of fraud, because fraud is a conclusion of law deduced from facts."

It is believed that every fact averred in the petition in reconvention, is pertinent and is well pleaded. The learned counsel for defendant in error does not indicate one which is not well pleaded. The allegations of fraud are not general but specific. It is, of course, for the court to determine whether the facts averred constitute such a case of fraud practiced by the defendant upon the plaintiffs in error, to their damage, as to entitle them to any relief. For of course if entitled upon the case stated to any relief at all a demurrer will not lie.

What is the case averred in the petition in reconvention? The pith and substance of it may be condensed into a few words. The Crescent City Gas Light Company was a corporation with a capital stock of the nominal par value of three millions of dollars, divided into thirty thousand shares, of one hundred dollars each. The company owned no works or property, but possessed a franchise of very great value, to-wit. The exclusive right to make and vend gas in the City of New Orleans, for a long term of years. The New Orleans Gas Company owned gas works, pipes, and all the requisite property, apparatus and appliances to furnish the population of the City of New Orleans with gas, but their right to make and vend gas in the city was shortly to expire, at the date from which the exclusive right of the Crescent City Gas Light Company was to take effect.

That Oglesby being the owner of thirty-five hundred and fifty, and Cassard the owner of eleven hundred and fifty shares of the stock of the Crescent Company, Attrill, covertly and clandestinely, through parties interposed, and without the knowledge of Oglesby or Cassard, became possessed of all of the stock of the company, except a small minority of shares held by Oglesby, Cassard and a few others; and then for the purpose, and with the design of enabling him to get possession of these minority shares also, so as to engross to himself, as he claims in his petition in this case, to have succeeded in doing *all the stock*

of the company as sole owner thereof, "he combined with a set of men who were completely under his influence, and subject to his management and control, to put them in the office of Directors of the Crescent City Gas Light Company," and that he succeeded in putting in office a board of such men, who are named, of which one Wibray was made president. That Attrill then through his control over the men he had so put into office "induced them to *adopt a scheme* whereby he could purchase the stock of the Crescent City Gas Light Company for a *mere nominal price*," that in furtherance of said scheme the said board made a certain assessment on the stock, "and still further *to consummate the designs of said Attrill threatened to repeat the assessment and to increase it until the entire stock should be paid up*." Trans. 11, 12, 13.

That at the time these assessments and threats of further assessments were made, no arrangements had been made to purchase property, to build gas works or to lay pipes, and that the Wibray board had no serious designs of doing either, "*their sole object* being, instigated thereto by the plaintiff, to induce the share holders *to give up their stock for a mere nominal price, that it might enure to his benefit*." That against Oglesby and Cassard, who remonstrated against these assessments, they were inexorable and insisted upon their being paid, "*although they agreed that among themselves* no assessment of their stock should be made." Trans. 12.

Oglesby and Cassard admit that suits were brought against them to enforce the payment of the assessment made as alleged in the petition, and that they made the stipulations by which the Crescent City Gas Light Company accepted the transfer of their stock, but that the stipulations were made in error as to the facts; that the assessments made and threatened to be made involved the payment by them of enormous sums of money; but that they would not have compromised the suits but would have defended them, had not "Attrill and the said board of directors concealed from them the object and design of said assessment," the real and *sole* design being as elsewhere averred in the petition in reconvention to depreciate or *bear* the minority of the stock in the hands of its holders so

as to enable Attrill to engross it to himself at a mere nominal price. The petition in reconvention avers that Oglesby and Cassard only ascertained the truth of the matter in relation to the conduct of Attrill and the Wibray board of directors, as set forth in the petition in reconvention within six months from the time of filing their claim in reconvention.

It appears from the averments not only of the petition in reconvention, but also from those of the original petition of Attrill, that after he had succeeded in squeezing out Oglesby and Cassard, and *all other stockholders*, and in engrossing to himself for little or nothing *all* of the stock of the Crescent Company, by consolidation with the New Orleans Gas Company, which owned a complete 'plant' or outfit for making, supplying and vending gas to the population of the city of New Orleans, the franchise or exclusive right of the Crescent City Company to make and vend gas in the city of New Orleans for a long term of years, which was the *only property or right of any value* which that company possessed, was disposed of by Attrill at a nominal valuation in the stock of the consolidated company, of one million two hundred and fifty thousand dollars, represented by twelve thousand five hundred shares of one hundred dollars each, of such real and actual value that Attrill in his petition avers that the notification sent to the president of the New Orleans Gas Company "by which defendants set up a claim to ownership of forty-seven hundred shares of stock in the Crescent City Gas Light Company which throws a cloud over the title of a large portion of the shares of stock allotted to your petitioner by the agreement of consolidation," occasioned him damage to the amount of *two hundred thousand dollars !*

It is apparent from the face of the pleadings that the valuable franchise of the Crescent City Company, which was all it had to put into the consolidated company, was disposed of by Attrill after he had succeeded in squeezing out all the minority stockholders, for stock in the consolidated company representing one-third interest in the property of the old Gas Company of the value of millions of dollars.

Here is a case of one who, holding a majority of the stock in a corporation without property or assets, other than a very valuable franchise and its stock subscriptions, puts his puppets into office as directors, for the purpose through them, of putting the assessment screw to the minority holders (with the distinct understanding that it is not to be applied to himself), in furtherance of a fraudulent scheme and for the sole purpose of enabling him by indirection to engross to himself for a vile price or no price at all the minority stock; and who succeeds in so doing, and thereby becomes the sole apparent owner of the valuable franchise which he thereupon disposes of for stock representing a third interest in productive property of the value of millions. And yet the Supreme Court of the United States is called upon to say in this case, that the victims of such fraudulent machinations and abuse of fiduciary trust are not entitled to any relief at all in a Court of justice, and that their victimizer is not to be disturbed in the enjoyment of the fruits of his fraud! In the language of the Supreme Court of Louisiana, in *Noyes vs. Loeb*, 23 A. 14—"It would be a reproach to any system of laws to say that it was inadequate to afford relief upon the state of facts admitted by the pleadings in this case." It is not believed that the law of Louisiana or the general law of the land is liable to such imputation.

Averment of purpose, design or intention, is averment of matter of *fact*, issuable, and susceptible of proof in many ways. A demurer to such averment *admits* the existence of the purpose or design averred. And, therefore, for the purpose of this part of the argument the fact that the *purpose* and *design* of the assessment was to compel the holders of the minority stock to relinquish, and to enable Attrill indirectly to acquire the stock for a nominal price, and that the intention and purpose was to enforce the assessment against the holders of the minority stock, *but not against Attrill*, are admitted to be true.

No amount of erudition nor accumulation of authorities, it is submitted, can warrant a court of justice in saying that the victims of such designed and premeditated rascality as that, are not entitled to relief at its hands. I shall, therefore, not com-

ment on any of the numerous cases collected in this connection in the brief of the learned counsel for defendant in error. But, although it may seem supererogatory in an argument addressed to the Supreme Court of the United States to do so, I shall refer to one or two authorities in support of the proposition that the petition in reconvention does state a case entitling the petitioners to relief.

Not only do the facts averred entitle the plaintiffs in error to the remedy at law they seek, but they would be sufficient, to entitle them to a more specific and ample remedy in equity.

In Thompson on the Liability of Officers and Agents of Corporations, at page 382 *et seq*, it is said: "It being a conceded doctrine of courts of equity that the directors of corporations are trustees for the share holders, and trusts being one of the leading heads of equity jurisdiction, it would seem to follow as a matter of course, that courts of equity would entertain a bill brought by a share holder against directors for relief on account of frauds and breaches of trust committed by them in the management of corporate property. But this is so only in the event of the corporation refusing to bring such a bill. * * * If every share holder were allowed to bring such suits at pleasure the directors might find themselves harrassed by a multiplicity of suits and endless litigation. In all these cases the court constantly keeps in mind the distinction between the artificial being, the corporation, and the agency through which it acts, namely, the directors themselves. Now it is frequently said, and in a certain sense, it is true, that the directors are the corporation. But it is not so in the sense in which we are now considering the question; for since the corporation may sue its directors, the absurd conclusion would follow that a corporation might sue itself. This is not what the courts mean. The meaning of the rule is, that if the directors are unfaithful to their trust, the ~~directors~~ stockholders must act together in the manner prescibed by their charter and by-laws, and elect a new board, through whose agency, by the proper legal proceeedings, they may call the old board to account, and this, it is believed, is generally the way in which share holders assert their remedy against unfaithful trustees.

But, then, the whole history of equity jurisprudence presents the spectacle of a race of diligence and skill between the rogue and the chancellor. If the chancellor were tied down to fixed rules and methods of procedure, it is easy to see that the rogue would, in nearly all cases, come out ahead; for no sooner would the chancellor lay down some rule to circumvent roguery, than the ingenuity of the rogue would invent some means of circumventing the rule, and there is no better illustration of this than what we are now considering. If the shareholders could have no relief against their unfaithful directors, except by assembling and electing a new board of directors, through whom to assert such relief, *the directors could effectually destroy the rights of a minority by getting and keeping control of a majority of the shares*, and constantly re-electing themselves to office.

Notwithstanding the ready devices with which the Courts have met such attempts, *this species of roguery has grown into a science, with a district nomenclature.* The interior organization or conspiracy, composed of the holders of a majority of the shares is called a "ring," and the business of the conspiracy is called "wrecking the corporation." The facts averred in the pleadings in the present case afford a notable example of one mode in which this result may be accomplished. The writer to whom reference is made gives another. "This process of 'wrecking' which has been seen in many cases of railway corporations, is sometimes carried out in this way. Either the property is allowed to run down, or *under some pretext of improvemnt*, amelioration or extension of business it is 'bonded'—that is to say negotiable debentures are issued, secured by a mortgage of the corporate property. The scheme is so managed that the majority of these debentures find their way into the hands of the "ring." * * One of the bondholders * * * files a bill in equity to foreclose the mortgage, or it is done by the trustee in the mortgage, himself the agent of the "ring." The corporation and the directors are made defendants. *Now the directors all being in the "ring,"* the allegations of the bill are admitted in the answer which the corporation makes to the bill, and also in those made by the direc-

tors. A decree is entered "by consent" for the sale of the property. This consent decree provides that payment of the purchase money may be made in the mortgage debentures. The property is sold at auction, is bid in by a member of the "ring" for the other members, they furnishing him with the bonds in which he makes payment. Another "consent decree" is made confirming the sale. The purchaser organizes a new corporation" (by consolidation with some other existing company or otherwise), "composed of himself and other members of the 'ring' which takes possession of the property.

Now what has been the result of this proceeding? Simply this: To make further use of the slang in which those who engage in such transactions express themselves, *All the stockholders of the corporation not in the "ring" are "squeezed out."*

The property has been sold under a mortgage. The common stock has become valueless." (The same result of "squeezing out" all stock-holders not in the "ring" may, as is illustrated by the case now before the Court, be reached by retaining the property of the Company and getting possession of all the shares of the common stock held by those not in the "ring," by sham assessments to be enforced against those *outside* the "ring," and not to be enforced against those *inside* of it.) Speaking with reference to the property of the corporation the writer goes on to say: "Those of the stockholders who, with the directors, were in the conspiracy got it all, and those who were out of it have lost all. Thus the Chancellor not only has not circumvented the rogue, but the rogue has made the Chancellor his tool in the accomplishment of his nefarious purpose. * * * * * * * *.

How, then, shall the chancellor circumvent such a scheme of fraud except by opening his ears to a single stockholder when he comes into court complaining of it? The answer is, there is no way; the necessity of listening to the minority and protecting their rights against their unfaithful trustees makes the rule which we are about to state. This rule is: If the directors of a corporation are guilty of a breach of trust, injurious to the corporate property, or *to the rights of the shareholders*, or

a portion of them, and if the corporation refuses to institute the proper proceeding to restrain or *redress* such injury, one or more of the shareholders may do it in their individual names. * * * An averment that the present board of directors openly connived at the fraud, and approved the transaction which the stockholders sought to impeach, was held to be sufficient excuse for not applying to them. * * * When the fact of complicity in the fraud or attempted ratification by the controlling officers of the company, appears from averments, so that the application would be unavailing, it need not to be formally alleged to have been made. * * * Referring to a distinction which several courts have taken or attempted to take between the jurisdiction of courts of equity to afford relief at the suit of shareholders where the action is to restrain breaches of trust on the part of the directors or *to recover damages for the same*, and the want of jurisdiction on the part of such courts where the object of the bill is to influence corporate action, the writer at p. 386 goes on to say, "It is believed that an analysis of the nature of a joint stock corporation will show that, so far as those bodies are concerned, the distinction is wholly unsubstantial. It proceeds upon the idea that "corporate action" is an action different from the action either of the board of directors or the body of the shareholders. It proceeds upon the idea that the body of stockholders is one thing; that the board of directors is another thing; and that there is still another thing, namely, the corporation—consisting neither of the stockholders nor of the directors—consisting in fact of nobody and of nothing, and yet which is capable of acting and of being acted upon. If the directors do wrong under color of office, they are responsible only to that nonentity. If the stockholders are wronged by the directors, they can not sue the directors but must sue this nonentity. A useful fiction, and one whose chief advantage has been to give to extensive corporations a distinct autonomy, so that they could sue and be sued, contract and be contracted with, as one person, even by and with their own members, has thus been perverted in a manner which has confused the minds of judges, and caused them to shut the door of justice in the face of meritorious suitors. * * *

When directors violate their duty, act beyond the scope of their delegated authority, and practice frauds upon their constituents, it may be difficult to say upon what ground their action is attributed to the corporation, so as to cut off the rights of members of the corporation to call them to account, unless in cases where a distinct remedy is afforded against the corporation itself. If the courts are obliged to stay their hands whenever to move would have the effect of influencing corporate action, it would follow, that if a corporation should *by a vote of the majority of the shares*, condone the offense of their guilty directors or agents, then the *minority would have no standing in court* to object. It is almost needless to suggest that this is not the law."

Mr. Thompson, from whose treatise on the liabilities of officers and agents of corporations, the foregoing quotations have been made, is a writer whose works have been referred to with approval by this court, and whose text is supported by ample citation of authorities.

In the case now before the Court, it is averred, in the petition in re-convention, as a matter of fact—the truth of which must be taken as conceded in argument as upon demurrer to that petition, that the Board of Directors, whose action is complained of, were the mere puppets and tools of Attrill, who was their maker and master, and had put them into office for the purpose of effectuating his design to defraud the holders of the minority of the shares out of their stock, by the means and in the manner set forth in the petition. And such being conceded by demurrer to the averments to be the truth of the matter, he is, of course, responsible for their action of which, furthermore, he was intended to be and was the beneficiary. That the Wibray board were the mere tools and puppets of Attrill, results not only from the demurrer to those averments, but is fairly inferable from the fact, that at the time of the alleged sanction by the Board of Directors and by the meeting of share holders of the Crescent Company, of the consolidation with the New Orleans Gas Company, the averment is made and reiterated

by Attrill in his petition in this case, that he, Attrill, was THE SOLE OWNER OF ALL THE STOCK of the Crescent Company.

I shall next refer the court to an opinion of MR. JUSTICE WOODS, while Judge of the Fifth Circuit, in the case of *Kilgore* vs. *The New Orleans Gas Light Company, et als.*, reported in 2 Woods, 145, a case involving to a very material extent the same facts and transaction, as are involved in the present litigation, in which it was held that the remedy at law to which the plaintiff was entitled being inadequate and incomplete, he was entitled by reason of the element of fraud involved in the case, to the more ample and specific remedy sought by him in equity.

"The case was as follows: The bill was filed by complainant, who is a citizen of Ohio, against the New Orleans Gas Light Company, Thomas L. Wibray and John M. Conway, citizens of Louisiana, and Henry Y. Attrill, a citizen of New York.

It was alleged that the New Orleans Gas Light Company was a corporation existing as the result of a consolidation of two other incorporated companies of the State of Louisiana, united by virtue of the statutes of the State, to-wit: The Crescent City Gas Light Company and the New Orleans Gas Light Company. The complainant alleged that from and after March 26, 1871, he had been the owner of 1500 shares of stock in the former company, of which the defendant, Attrill, was the President; that Attrill conspired and confederated with the defendant, Wibray, and certain other persons not named, to obtain control of the Crescent City Gas Light Company, and to defraud all of the stockholders out of their stock. In pursuance of this conspiracy he obtained a large amount of the stock. Through collusion with the directors of the company he caused large assessments to be made upon the capital stock, amounting in the aggregate to seventy-six per cent. of all the capital stock; but they were never actually collected from the stockholders. For the non-payment of these assessments, which were fraudulent and unnecessary, the directors pretended to forfeit the stock of the complainant, and the same was subscribed for by Attrill, who claimed to have become owner

thereof. The assessments were part of the scheme by which to defraud the complainant and other stock holders, and to get the same into the possession of Attrill and his confederates.

The bill further alleged that, having obtained all or nearly all of the stock by these fraudulent means, Attrill caused himself and the said defendant, Wibray and others, to be elected directors of the Company, and himself to be elected President; that Attrill and his confederates, having thus obtained control of the Crescent City Gas Light Company—*Attrill, claiming in fact to own all the stock*—entered into a contract, dated March 29, 1875, authorized by an act of the Legislature, for the consolidation and union of said Company with the New Orleans Gas Light Company. By this contract, which was made an exhibit to the Bill, it appeared that the stock of the consolidated Company was stated to be three millions seven hundred and fifty thousand dollars paid up (37,500 shares), which might be increased to ten millions from the accumulated earnings of the Company, converted into works "or plant" during the operation of the Company, and such issues of new stock were to be distributed *pro rata* among the stockholders of the consolidated Company.

Of the thirty-seven thousand five hundred shares, twenty-five thousand were to be distributed *pro rata* among the stockholders of the New Orleans Gaslight Company.

All the certificates of stock issued by the Crescent City Gas Light Company, being 30,000 shares, were to be considered annulled and cancelled, and of no legal effect, and in no manner binding on the consolidated company, and in lieu thereof there were to be issued to Henry Y. Attrill, as representative of the stockholders of the Crescent City Gas Light Company, 12,500 shares of the paid up stock of the new consolidated New Orleans Gas Light Company.

The claim of the bill was that the assessments made on the stock of complainant in the Crescent City Gas Light Company were fraudulent, that the alleged forfeiture of his stock, and the subscription therefor, by Attrill, was fraudulent; that complainant continued to be and still was the equitable owner of the stock, and was entitled either to 1500 shares in the

Crescent City Gas Light Company, if the consolidation of that company with the New Orleans Gas Light Company should be set aside, or to a proportionate number of shares in the said latter company, if the consolidation of the two companies should be sustained."

The case was heard on demurrer to the bill.

WOODS, Circuit Judge. The objections made to the bill in the argument were:

1. Want of equity.

* * * * * *

1. In my judgment, the bill has equity. Its averments bring it under the well known head of equity jurisdiction-fraud. The practices charged against Attrill and his associates make a strong case for the interposition of a court of equity.

It is clear that there is no adequate relief at law. A money judgment against Attrill for his fraudulent conversion of the stock of complainant is not the relief he wants. The purpose of the bill is the recovery of complainant's stock, of which he had been fraudulently dispossessed by Attrill, who claims title to it. Clearly the result can only be reached by the decree of a court of equity.

There may be defects in the frame of the bill which require amendment, but the case as stated seems to me to be clearly one of equitable cognizance."

It is respectfully submitted that, upon principle and authority, the petition in reconvention in the present case not only states a case entitling the petitioners to relief, but a very strong case.

As is said by counsel for defendant in error, at page 10 of his brief, "It is manifest from the various instructions given or refused, that the court below was of opinion, that the demand in reconvention disclosed a legal cause of action."

The court below was, however, also of opinion that the cause of action arose out of an offense or quasi-offense, and was subject to be barred by the limitation provided by article 3536 of the Civil Code, which is in these words:

"The following actions are also prescribed by one year:

That for injurious words, whether verbal or written, and that for damages caused by animals or resulting from offenses or quasi-offences."

This charge was a misdirection to the jury upon one of the most material points in the case.

By reference to the Revised Civil Code of Louisiana, of 1870, it will be seen that the rights and liabilities arising out of contracts are treated of under the general head of Conventional Obligations, from page 214 to 281, from Article 1761 to Article 2291; and it will be seen that the Code under this head provides for redress of all wrongs arising out of error, fraud, deceit, misrepresentation, concealment or violence pertinent to matters of contract; and that the limitation of actions for redress of wrongs of that character is the special topic of Article 2221, which declares, that in all cases in which the action of nullity or rescission of an agreement is not limited to a shorter period by a particular law, that action may be brought within ten years, and that "the time commences *in cases of violence*, only from the day on which the violence ceased; and in cases of error or *deception* from the day on which either was discovered."

Here is a plain provision of the law of Louisiana specifically applicable to actions arising out of error, deception or violence in matters of contract.

The claim in reconvention of Oglesby and Cassard against Attrill is distinctly predicated upon averments of fraud and deception on his part superinducing error on their part in matter of contract, whereby he obtained from them for *no price at all* and for the sole consideration of the dismissal of the suits against them to enforce the collection of fraudulent assessments on the stock held by them, their stock itself, which was property of value so great that he avers that by the mere assertion by them of title to it against him, he has suffered damage to the extent of two hundred thousand dollars for the recovery of which he sues them. The claim of the plaintiffs in reconvention is not for damages against him for a tort, but for the value of the property ob-

Crescent City Gas Light Company, if the consolidation of that company with the New Orleans Gas Light Company should be set aside, or to a proportionate number of shares in the said latter company, if the consolidation of the two companies should be sustained."

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tained by him from them by means of a contract, entered into in error on their part superinduced by fraudulent representation and concealment on his part. It is a confusion of the distinctions laid down by the Code to confound such a suit with an action for damages *ex delicto or ex quasi delicto,* liable to be barred by the prescription of one year.

After providing as we have seen for all rights and liabilities arising out of error, fraud or violence as affecting contracts, under the grand sub livision devoted to conventional obligations, the Code proceeds to provide for rights and liabilities arising from causes other than contracts, and circumstances of error, fraud or violence incident to contracts. This is done under title V of the Code, the preceeding title IV having made full provision for rights and liabilities arising from contracts.

Under the head of quasi-contracts, and of offenses and quasi-offenses, article 2292 declares that certain obligations are contracted without any agreement, either on the part of the person bound, or of him in whose favor the obligation takes place. "The obligations which *arise from a fact,* personal to him who is bound, or relative to him, result either from quasi-contracts, or from offences or quasi-offences.

Article 2293 declares that quasi-contracts are *the lawful* and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties, and article 2294, that all acts from which there results, *without any agreement,* an obligation in the manner expressed in the preceding article form quasi-contracts. After treating in detail of obligations arising from quasi-contracts, the Code next treats of offenses and quasi-offenses.

The general principle of all obligations arising from that source is laid down at the outset in article 2315. After having made full and specific provision for all rights and liabilities arising out of contracts and their incidents of error, fraud or violence, and out of quasi-contracts, the Code proceeds to provide for that class of obligations recognized by the civil law, arising independently of contract and quasi-contract, and lays down the general rule that "every *act,* whatever, of man that

causes damage to another obliges him, by whose fault it happens to repair it," and the next article, 2316, declares that " every person is responsible for the damage he occasions not merely by his *act*, but by his negligence, his imprudence or want of skill."

Article 31, of the Code of Practice declares that personal action arises from offences where one has become liable to another for the injury he has inflicted on him *by some crime or offence, such as theft or murder*, and Art. 32, that they arise from quasi-offences where the ground of action is the injury done to another by one of those faults which are not considered as real crimes or offences.

The distinction made by the civilians, and recognized by the courts administering the civil law, between obligations *ex contractu* or *ex quasi contractu*, and obligations *ex delicto* or *ex quasi delicto*, is that the rights and liabilities *ex contractu* or *ex quasi contractu* arise out of duties due from certain persons to certain other persons by reason of certain contractual relations arising between them, such as the duty of fair dealing existing reciprocally between the parties to contracts, and that the rights and liabilities arising *ex delicto* or *ex quasi delicto* do not arise from the breach of a duty or obligation particularly due from one person to another, but from *the breach of a general duty due from all persons to all others.*

The provisions of the Codes on the subject of the prescription of actions for offences and quasi offences, relate to rights arising from the breach of obligations of this general nature and to none others.

It would be a gross anomaly in the legislation of Louisiana if one of the shortest limitations known to law, should bar a suit for relief against fraud in matter of contracts.—

It would be entirely out of accord with the spirit and policy of the legislation and jurisprudence of the civilized world, in that regard.

In *Mechond vs. Gerard*, 4 How., 560, this Court said: " We have thus shown, that those purchases are fraudulent and void, from having been made *per interpositam personam*, and if they were not so on that account, they are void by the rule in

equity in the Courts of England, and as it prevails in the Courts of equity in the United States. It has also been shown that they are void by the law of Louisiana, as it was when they were made by executors, and that such purchases never were countenanced in that State by any qualifications of the civil law rule, prohibiting purchases by those who stood in such fiduciary relations to others; that the act could not be generally done, without creating a conflict between self interest and integrity. * * *

Although statutes of limitation do not apply to any equitable demand, courts of equity adopted them therein; or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. * * * There is no rule in equity which excludes the consideration of circumstances, and, in cases of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or becomes known to the party whose rights are affected by it.

In *Irvine vs. Douglas and others*, appellants; *Kirkpatrick*, respondent, in the House of Lords, 3 English Law Rep., 24, Lord BROUGHAM, said, * * thirty-seven years after the one deed was made, and thirty-nine years after two others, an impeachment by this action upon the allegation of fraud is brought against those instruments * * * My Lords, *no time will run as a common law limitation against fraud; that must on all hands be admitted*, no time say the Scotch lawyers, can be taken as a bar to an action of reduction like this, unless time and acquiescence be specially pleaded. * * * *I too say that no time will run to protect and screen fraud.* I too say that a Court of Equity will overleap the barrier of time to get at the fraudulent parties and their deeds, and *to undo those deeds, and* to prevent any-one, whether accomplice or innocent, *from profiting from the fruits of the fraud.* I too say, therefore, that the length of time which has elapsed is no bar to this suit. * * I have stated enough with respect to the time. *I have stated the principle to be, of*

which there is no question, that the mere lapse of time is no bar in case of fraud."

So under the legislation and jurisprudence of France there is no short and peremptory bar by limitation of time to actions for relief against fraud in matters of contract, but the only prescription applicable to such actions is the largest known to the French law, that of thirty years. Articles 1382 and 1383 of the Code Napoleon correspond to the substance of articles 2315, 2316 and 2317 of the Civil Code of Louisiana. The articles of the French Code are the first two articles under the head " Des Délits et *Quasi-Délits*," and are as follows:

Article 1382. Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer.

Article 1382. Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.

LAROMBIERE, a commentator on the Code Napoleon, of the highest repute in France, and whose works are frequently referred to by the courts of Louisiana upon questions of interpretation of analogous articles of the Louisiana Code, in his comments upon the two articles of the Code Napoleon just referred to, says; " La faute dont parle l'article 1382 *n'a aucun rapport à la faute contractuelle,* * * * Nous le répétons donc, les dispositions des articles 1382 et 1383 *sont tout à-fait étrangèrs* à l'appreciation et aux consequences *des fautes* qui peuvent êtré commises dans l'accomplissement des obligations *résultant d'un contract ou d'un quasi*-contrat. Elles s'apprêcient d'aprés les règles particulieres à l'acte de l'execution duquel el s'agit; et quant à leurs consequences elles se déterminent d'après les articles 1146 et suivants, qui traitent des dommages et interets résultant de l'inexecution des obligations." Vol V. p. 689, No. 8.

Ce n'est pas cependant que les fautes commises dans l'execution d'un engagement conventionel ne puissent elles mêmes constituer, à raison de leur caractère spécial, un véritable délit, tombant sous l'incrimination de la loi pènale. Ainsi, un locataire incendie volontairement la maison qu'il occupe; un

dépositaire, un mandataire detournent ou dissipent les choses qui leur ont été confiées; un mêdecin maladroit ou imprudent cause involontairement la mort de son malade; dans ces cas divers et autres semblables, il y a, de la part du contrevenant, l'inexecution des engagements qu'l avait contractés, et, de plus, il s'est rendu coupable d'un crime ou d'un délit qualifies par la loi pénale. La partie lésée aura en consequence, une action en dommages et intérêts, qu'elle *fondera, à son choix, sur l'une ou l'autre* de ces deux causes, soit sur l'inexécution des engagements conventionnels, d'aprés les articles 1146 et suivants, soit sur l'existence d'un préjudice causé par un délit ou quasi-délit, d'aprés les articles 1382 et 1383.

Nous verrons même plus loin que cette circonstance *qu'il préexiste une convention, exerce une influence décisive sur la durée de la préscription de l'action* en dommages et intérêts." Id. Ib. p. 690, No. 9.

"En effet, tout délit de droit penal, crime, délit ou contravention, donne lieu à une double action, l'une publique, qui a pour objet l'application de la peine édictée par la loi, l'autre civile, qui a pour objet la reparation du préjudice causé."

L'action pour l'application de la peine n'appartient qu' aux fonctionnaires auxquels elle est confiée par la loi. L'action en reparation d'un dommage causé par un crime, par un délit ou par une contravention peut être exercée par tous ceux qui ont souffert de ce dommage. * * * Id. Ib., p. 721, No. 42.

" L'une et autre action s'éteignent enfin par la prèscription. Mais quelle est la durée de cette préscription, en ce qui concerne l'action en dommages et interets? Cette question ne peut être résolue qu' á l'aide de-plusieurs distinctions.

S'agit-il d'un simple délit ou quasi délit de droit civile, d'un fait qui n'est pas incriminé par la loi pènale; *l'action en dommages et interets qui en resulte ne se prescript que par le laps de temps ordinaire*, c'est à dire, par *trente ans*, conformément aux principes du droit commun auquel il n'est apporté aucune dérogation." Id. Ib., p. 725, No. 48.

" Cependant, dans le cas même où le fait qui donnè lieu à l'action en dommages et interêts est incriminé par la loi pénale, comme constituant un crime, un dèlit ou une contravention,

cette action n'est pas toujours indistinctment soumise à la même prèscription que l'action publique. Elle ne sera éteinte que par la prescription ordinaire"—which is of thirty years, as stated above—"lorsque, in-dèpendamment du fait sur lequel sefond son exercise, elle a sa cause et son titre dans quelque droit antèrieure et préexistant au dèlit, appartenant à la partie lésée.

S'agit il, par exemple *d'un abus de confiance*; le propriétaire a une *action en restitution*, ou en dommages et interets la quelle se fondant sur le contrat antérieur de louage, de dêpot ou de mandat existe indépendemment de celle qui résulte du délit, et survit conséquemment à l'action publique et à l'action civile qui ne seraient basées que sur ce seul fait * * Dans tous ces cas et autres semblables, le délinquant est bien affranchi par le bénéfice de la préscription des consequences de son délit en tant qu'il est consideré comme constituant une infraction pénale; mais en tant qu'il est envisagé comme établissant une contravention à des engagements antérieurement contractés, il donne lieu à une action indépendante de toute action publique ou civile proprement dite. Cette action se fondant uniquement sur inexécution d'engagements preéxistants au delit, reste soumise à la préscription civile ordinaire." de trente ans.

1 d. 96, p. 728, No. 49. See also in this connection Zacharie, Vol. 3. p. 193 Duranton, Vol. 13, No. 707 and Vol. 21, No. 102. Sourdat No. 376.

MARCADE, another commentator upon the Code Napoleon, whose works are constantly resorted to by the Courts of Louisiana for aid in the interpretation of corresponding articles in the Civil Code of Louisiana, commenting upon the articles 1382 and 1383 of the Code Napoleon, relative to the obligations arising from offences and quasi-offences, says: "Il ne s'agit donc que de faits soit positifs, soit nègatifs qui présentent la violation d'un devoir.

Remarquons bien que c'est de la violation d'un devoir proprement dit qu'il s'agit, *d'un de ces devoirs generaux existant au profit de toutes personnes, et non pas de la violation du devoir existant specialement de telle personne dèterminèe à telle autre personne dèterminèe, et qui constitue l'obligation.* Les violations d'obliga-

tion sont prévues par la section 4, du chapitre 3, du titre précédent (Art. 1146–1155); le code ne s'occupe plus ici, sous le nom de délits et quasi–délits, que des violations de devoirs généraux. Marcade, Explication du Code Napoleon, vol 5, p. 267, No. I II.

At the time of the occurrence of the transactions complained of in the petition in reconvention, there were existing anterior contractual relations between Attrill, and Oglesby and Cassard, arising from their being stockholders in the same corporation, and fiduciary relations arising from a contract *uberrimæ fidei* between the directors, who were entirely under Attrill's control, and Oglesby and Cassard, whose mandataries they were, as well as of Attrill as holder of the majority of the stock.

The law of Louisiana is not subject to the reproach that a party is screened from liability to suit for violation of obligations of this character by the short and peremptory limitation of one year.

The doctrines of the French civilians to which reference has been made, are recognized and followed by the courts of Louisiana as affording a correct interpretation of the corresponding articles of the Louisiana Civil Code.

In *Percy* vs. *White*, 7 Robinson, 513, it was held that an action by stockholders against the directors of a corporation for losses sustained through their negligence, fraud or mismanagement, was an action for damages *ex-contractu* as mandataries, and subject to the prescription of ten years.

In *Lallande vs. Ball*, 20 A., 194, plaintiff sued defendant on a promissory note, representing part of the price of a tract of land. The defendant claimed in reconvention as damages the sum of ten thousand dollars, incurred in consequence of fraudulent misrepresentations made by the vendor of the land, whereby he was induced to make the purchase, and which occasioned the loss claimed on reconvention. The plaintiff pleaded that the claim in reconvention was barred by the prescription of one year against claims arising from offences or quasi-offences. The Court held that the claim being for losses occasioned by fraudulent misrepresentations connected with

a sale, was *ex contractu*, and that the presciption of one year did not apply.

In *Kohn vs. Carrollton*, 10 A., 719, the Court said: "The plaintiff has appealed from a judgment dismissing his suit upon a plea of prescription interposed by the defendants.

The only question decided below and discussed here seems to be this; does the action spring *ex delicto* or *ex contractu?*

We cannot concur with the District Judge in considering it an action in damages for an offence or quasi offence, and, therefore, we find the prescription of one year to be inapplicable. * * *

The allegation that the plaintiff has been damaged does not determine the question, for damages result as well from the violation of contracts, either express or implied, as from the commission of offences or quasi-offences, nor will the casual and auxiliary averments of illegality, wrong and even violence conclude the plaintiff as to the character of his action, unless it should appear from a fair examination of his whole petition that an alleged tort forms the gist of the complaint. * * *

In his commentary on the Napoleon Code, Marcadé has developed the distinction between damages *ex delicto* and damages *ex contractu* with his usual brevity and felicity. The former flow from the violation of a general duty, the latter from the breach of a special obligation.

Commenting upon article 1382 of the French Code (C. C. 2315), Marcadé says: "Remarquons bien que c'est de la violation d'un devoir proprement dit qu'il s'agit, d'un de ces devoirs généraux existant un profit de toutes personnes, et non pas de la violation du devoir existant specialement de telle personne déterminée à telle autre personne déterminée, et qui constitue l'obligation," etc. "Le Code ne s'occupe plus ici, sous le nons de délits et quasi-délets que des violations de devoirs généraux."

In the *City of New Orleans vs. The Southern Bank*, 31 A. 566, the Court say: "The Pandects clearly draw the line of distinction between contracts and delicts. *Ex maleficio nascuntur obligationes, veluti ex furto, ex damno, ex rapina, ex injuria, quæ omnia unus generis sunt; nam hac re tantum consistunt id*

est ex ipso maleficio, quum alioquin ex contractu obligationes non tantum re consistunt, sed etiam verbis et consensu. Dig. L. 44, Tit. 7, Sec. 4.

The distinction between damages *ex delicto* and *ex contractu* is, that the latter ensue from the breach of a special obligation, and the former from the violation of a general duty. "And in support of this proposition the Court quotes the same passage from Marcadé, Explication du Code Napoleon, art. 1382, which was quoted by the Court in Kohn vs. Carrollton, supra.

Again in the still later case of *Board of School Directors vs. Trimble*, decided in 1880, and reported in 32d Annual p. 794, it is said, "* * * The defendant contends that this is an action *ex delicto*, and that the prescription of one year applies thereto; that the settlement between the parties has the force and effect of a judgment, and that a suit to annul the judgment on the ground of fraud must contain the allegation that the discovery of the fraud was made within one year of the date of the filing of suit, and that when error and fraud are alleged as to the settlement, the items of such error must be specially alleged and proved.

This action is not in our opinion one which arises from an offence or quasi-offence. It is brought to annul a settlement alleged to have been made in fraud and error, by which an officer of the School Board, who was virtually an agent of that Board and received and held funds for them subject to their control and disposition only, is charged with a responsibility and liability for those funds which are retained by him, and withheld from those rightfully entitled to them, under a settlement or transaction averred to be fraudulent and erroneous. The obligation of the defendant independent of that created by his official bond, was one *ex contractu*, or an implied contract, and the violation of any of the duties or obligations arising therefrom, renders him liable, and an action therefore is only prescribed in ten years. The obligation may exist without the bond; it springs out of the relation which defendant bore to the plaintiffs, fiduciary in its character, and not falling under the prescription claimed by defendant." After quoting from the opinion in

City of New Orleans vs. *Southern Bank*, *supra*, the doctrine there recognized that, "The distinction between damages *ex delicto* and *ex contractu*, is, that the former ensue from the breach of a special obligation and the latter from the violation of a general duty," the Court goes on to say: "As we have before said, the cause of action herein is not *ex delicto*, but we regard it as being *ex contractu*, or on an implied contract, and we are sustained in our views as to the non-applicability of the plea of prescription made by the defendant in this case. The case of *Mulford* vs. *Wimbish*, 2 An. 443, conclusively establishes the prescription which applies to actions for the nullity, or rescission of agreements. The Court held: "The prescription by Art. 2218"--now Art. 2221—"relates to cases of error, fraud or violence in agreements which are expressly included in it." And, "this article 2218 relates to the action of nullity, or of rescission of agreements, and provides that in all cases in which either action is not limited to a shorter period by a particular law, it may be brought within ten years."

I have gone thus at length into the question of prescription, as involved in this case, for the reason that the learned judge presiding in the lower court instructed the jury positively that the cause of action averred in the petition in reconvention was an offence or quasi-offence, and was barred by the prescription of one year, and refused to instruct the jury when requested to do so on behalf of claimants in reconvention, that the only limitation properly applicable to the cause of action averred in reconvention, was that of ten years. Trans. page— and that the correctness of the ruling of the lower court as to the instructions given and as to those refused, is strenuously insisted upon by my learned brother, of counsel for defendant in error, in his brief filed in this Court.

Under the foregoing authorities, it is submitted that it is apparent that the lower Court erred in both instances; that the instruction given should have been refused and the instruction refused should have been given.

There are various other important assignments of error made, but they are all so fully ~~averred~~ covered by the brief of my learned colleague, Mr. DeGray, that I can add nothing to what he has said.

Upon the whole it is respectfully submitted the verdict and judgment below should be set aside, and a *venire de novo* be awarded.

HENRY B. KELLY.

Of Counsel for Plaintiffs in Error.

March, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 299.

JOSEPH H. OGLESBY AND JULES CASSARD, PLAINTIFFS IN ERROR,

versus

HENRY Y. ATTRILL, DEFENDANT IN ERROR.

THOS. J. SEMMES,
Of Counsel for H. Y. Attrill, Defendant in Error.

A. W. Hyatt, Print, 73 Camp St. N. O.—21,913

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 299.

JOSEPH H. OGLESBY AND JULES CASSARD, PLAINTIFFS IN ERROR,

versus

HENRY Y. ATTRILL, DEFENDANT IN ERROR.

This suit was originally instituted in the Fourth District Court, for the parish of Orleans, on 12th of April, 1875.

The petition filed in that court by Attrill, the defendant in error, alleges:

1st. That he had become the sole owner of all the capital stock of the Cresent City Gas Light Company, a corporation created by an act of the Legislature of Louisiana, approved 20th of April, 1870, and an amendatory act approved 10th of July, 1873; and that the capital stock of the company consisted of thirty thousand shares of one hundred dollars each.

2d. That by virtue of an act of the Legislature of Louisiana, approved 12th of December, 1874, entitled "An Act to authorize the consolidation of business or manufacturing companies or corporations," the said Crescent City Gas Light Company was consolidated with "the New Orleans Gas Light Company," also a corporation created by the laws of Louisiana; that the agreement for consolidation between the said companies was entered into through their respective Boards of Directors in the month of March, 1875, and that said agreement was ratified by the requisite number of owners of stock on 9th of April, 1875, and on the ensuing day the agreement of consolidation was deposited with the Secretary of State, as required by law.

3d. That by virtue of the consolidation agreement the consolidated company retained the name of "The New Orleans Gas Light Company," and the full paid stock of the company was fixed at $3,750,000, divided into 37,500 shares of $100 each, of which 12,500 shares were allotted to Attrill, as owner of all the capital stock of the Crescent City Gas Light Company, and the residue, 25,000 shares, were allotted to the owners of the stock of the New Orleans Gas Light Company.

4th. That at 2 P. M. on 10th of April, 1875, about the time of the final consummation of the said agreement of consolidation, the defendants below, Oglesby and Cassard, the former representing himself as entitled to 3550 shares, and the latter to 1150 shares in the Crescent City Gas light Company, united with one Hernandez, in a letter addressed to James Jackson, President of the New Orleans Gas Light Company, in words following, to-wit:

"NEW ORLEANS, April 10th, 1875.

"JAMES JACKSON, President Gas Company:

"By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Company. We, the undersigned, hereby notify you that at the commencement of the litigation with your company, we were the owners of the shares in the Crescent City Gas Company attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of the said company, and that we intend to prosecute our claim to the same, and hereby notify you that any compromise or adjustment you may make with the said Crescent City Gas Company will be subject to our rights, to the extent above stated, and that legal proceedings will be instituted to enforce our said rights."

5th. That said letter was written with the malicious intent to embarrass Attrill in the exercise of his rights under the consolidation agreement, and the claim therein asserted was groundless.

That on 7th of April, 1873, the Board of Directors of the Crescent City Gas Light Company had levied an assessment on the stock of said company of one and one-half per cent., and under said assessment Oglesby was bound to pay $6075 as owner of

4050 shares, and Cassard was bound to pay $1725 as owner of 1150 shares; that they refused to pay said assessment, and on 6th of May, 1873, instituted suit in conjunction with other stockholders to enjoin the Board of Directors from proceeding to enforce payment of said assessment, and in said injunction suit they set up "frauds and machinations of the officers of said company."

That on 14th of May, 1873, the Crescent City Gas Light Company brought suit against Oglesby and Cassard to enforce payment of said assessment; that on 15th of May, 1873, the defendant, Cassard, transferred his stock to F. A. Phipps, and on 22d of May, 1873, the defendant, Oglesby, transferred to said Phipps 3550 shares of his stock, and disposed of the residue to other parties. That said transfers were made by way of settlement and compromise of the rights of the respective parties, and that in pursuance of the agreement of compromise the following endorsement was written across the face of said transfer from Oglesby to Phipps, viz: "The Crescent City Gas Light Com-
" pany accepts and assents to the transfer of 3550 shares of stock
" in said company, made by Joseph H. Oglesby, upon which
" only fifty cents per share has been paid, and releases him from
"all past, present and future assessments that are made or may be
" made on said stock, and accepts
" in place of said Oglesby for all such payments past and pres-
" ent liability," and a similar endorsement in pursuance of the agreement of compromise was written across the face of the transfer made by Cassard, on 15th of May, 1873.

Thereupon, by agreement, the respective suits were dismissed, those of the company to enforce the assessment, and the injunction suit of Oglesby, Cassard and their associates to enjoin its collection.

6th. That the claim set up by Oglesby and Cassard, operated as a cloud on the title of Attrill, to the stock of the Crescent City Gas Light Company, and the shares of the consolidated company allotted to him in lieu of it, and depreciated the value of the shares so allotted, and therefore, he demanded damages to the extent of $200,000.

7th. On 30th June, 1875, the suit having been removed to the United States Circuit Court, at the instance of the defendants, they filed an answer and a reconventional demand, that is to say, a counter claim. Pleas in reconvention require no service and need not be put at issue by answer or default.

Bayly vs. Story, 30 La. An. 1212.

It is this reconventional demand and the trial thereof, which the Court is called on to review.

The verdict of the jury was to this effect: "We, the jury, find in favor of the defendants on the demand of the plaintiff, Henry Y. Attrill, and we find that the reconventional demand of the defendants should be dismissed," p. 17.

The plaintiff, Attril, has sued out no writ of error, so that the case comes up on writ of error taken by the defendants below, to revise the rulings of the Court, as to the reconventional demand.

The answer and the reconventional demand may be treated as a unit; the same facts constitute the foundation of both.

The substance of the reconventional demand is as follows:

A. That the Act of 1835, incorporating the New Orleans Gas Light Company, was by the terms of its charter to expire on 1st April, 1875; the attempt to extend the charter by the Act of 1860, it is alleged was inoperative, because the Act of 1860, was unconstitutional; the reason why it was unconstitutional is not mentioned.

B. That the Legislature of Louisiana, by the act incorporating the Crescent City Gas Light Company, granted to it the valuable and exclusive permission, to make and vend gas in the city of New Orleans, but that the corporators and the defendants never contemplated the construction of gas works, until it was necessary to do so.

C. That such necessity was not expected to occur, because in the charter granted to the New Orleans Gas Light Company in 1835, and which, it is alleged, would expire on 1st of April, 1875, there was a provision authorizing the city to purchase the

gas works belonging to the New Orleans Gas Light Company; the defendants and other corporators of the Crescent City Gas Light Company had in contemplation an arrangement, by which the city, becoming purchaser from the New Orleans Gas Light Company of its works, plant-pipes, etc., would, on advantageous terms, re-sell the same to the Crescent City Company, and, therefore, the defendants and other corporators of the Crescent City Company, thought it good policy to await until time should develop "whether they could purchase from the city or should be "compelled to build themselves."

D. That the Crescent City Company was organized in 1870, and the defendant, Oglesby, was elected President for the years 1870 and 1871, and Cassard was elected President for the year 1872, but they did no more than keep up the organization.

E. That Attrill, who was a large operator in gas works and gas stocks, having learned that the valuable monopoly had been granted to the Crescent City Company, inquired into the validity of the act of 1860, extending the New Orleans Gas Light Charter, and the act of 1870, incorporating the Crescent City Company. That he put forward as Directors men over whom he had unbounded influence, and who were subservient to his wishes, to-wit: Wybray, Conway, Herron, Phipps and others; and in 1873 elected them Directors, although Phipps and Conway were not eligible to the office of Director.

F. That said Board, elected in 1873, was not legally elected, and there has been no Board of Directors of the Crescent Company legally called or legally organized, and having the legal qualifications since 1872.

H. That Attrill suggested to the directors elected in 1873, and induced the adoption by them, of a scheme whereby he could purchase the stock of the Crescent City Gaslight Company for a mere *nominal price*.

That in pursuance of said scheme, the Board of Directors, on 7th April, 1873, levied an assessment of one and one-half per cent. on the stock of the company, and threatened to repeat the

assessment, and to increase it until the entire stock should be paid up; and that Attrill admitted that the assessment of each share of said company was 77½ per cent., which was, nevertheless, not true. When and where this admission was made, whether before or after the defendants sold their stock, is not alleged.

So far, what has Attrill done to the injury of the defendants?

1. That *said assessments were unnecessary; that so important a step did not fall within the province of the Board of Directors, under the circumstances in which they were placed; that they had made no arrangements to purchase property or to build gas-works, or to lay pipes, and they had no serious design of doing either, their sole object being, instigated thereto by the plaintiff, to induce* the stockholders to give up their stock, *that it might inure to his benefit*

There is no allegation that the assessments were *ultra vires*, nor that they were unnecessary had there been a *serious design* to build gas works, or buy property, or raise money for corporate purposes, but that they were unnecessary, and did not fall within the province of the Directors, "under the circumstances in which they were placed." In other words, proper stock-jobbing policy would have been subserved by waiting for developments; that is to say, waiting to see whether or not the city would or could buy out the old company, and sell to the new company on *advantageous terms.*

That the Court may better understand the meaning of this part of the petition in reconvention, it is necessary to refer to the legal status of the old company, which is found in the Acts of the Legislature of Louisiana, referred to in the petition and answer, and in the demand in reconvention.

The old company was chartered by an act of the Legislature of Louisiana, approved April 1, 1835. Section 42 provides, that at the end of forty years, the city of New Orleans should have the option to buy the gas-works, the price to be fixed by arbitrators, and the amount agreed on to be payable in bonds. By a subsequent act, approved 10th March, 1845, it was declared that the charter and the corporate privileges of the company should expire on 1st April, 1875.

The subsequent act of 1860, approved March 1st, enacted that "the charter of the New Orleans Gaslight Company, as now "established by law, shall remain in full force and effect until "the first day of April, 1895; provided, that nothing in this act "shall be construed so as to *continue the exclusive privilege* granted "to said company beyond the period fixed by its present act of "incorporation." etc

In other words, the Act of 1860, extended the corporate existence of the old company to 1895, allowing the exclusive privilege to expire 1st April, 1875.

In this state of things, the Legislature created the Crescent City Gas Light Company, by Act No. 97, approved 20th April, 1880. The eighth Section of the act conferred on the Company, "the sole and exclusive privilege of vending gas light in the "City of New Orleans, to such persons or bodies corporate, who "may choose voluntarily to contract for the same, *for the term of "fifty years from and after the date of the expiration of the Charter "of the New Orleans Gas Light Company.*"

The framers of this act were not aware of the existence of the Act of 1860, extending the Charter of the old Company to 1st April, 1895.

When it was discovered that the new Company's exclusive privilege would be inoporative until 1895, the suggestion was made that the Act of 1860 was unconstitutional, because its object was not expressed in the title, as required by the Constitution of 1852, in force when the Act of 1860, was passed.

The Act of 1860 was entitled, "An Act to extend the area "of gas lighting in the City of New Orleans, and to reduce the "price now paid by consumers."

The Act not only extended the charter, but it required of the company a reduction of the price of gas, to go into effect on 1st January, 1861, and the laying down of fifteen miles of main pipes within three years from 1st July, 1860. The suggestion of the invalidity of the Act of 1860, on account of its alleged defective title, was seized on by the incorporators of the Crescent

City Gas Company, who procured the passage of an amendatory act, approved July 10th, 1873, which, among other things, authorized the company to issue bonds, not exceeding a million dollars, to be secured by mortgage on its works and property, and confirmed to the company the exclusive franchise granted in the original act for fifty years, from 1st April, 1875, on which day it declared the charter of the old company expired.

The twelfth Section of the Act of 1870 required that the works of the company should be complete, and in condition to supply all the gas required for the City of New Orleans, within ten years from the date of the charter, otherwise, the charter to be null and void. The third Section of the same act empowered the Board of Directors to levy assessments on stock, at their descretion, up to $100 per share.

It is thus perceived that what is called Wybray's Board of Directors, the Board elected, it is said, by Attrill, and subservient to his wishes, were in office in 1873, when this amendatory act was passed, and it will also be observed, that the amendatory act of 1873, was approved July 10th, 1873, while the sales of the stock to Phipps, by the defendants, and the compromise with the company, were made on the 15th and 22d of May, of the same year.

K. I now proceed with the allegations of the reconventional demand.

That the stockholders, and especially the defendants, remonstrated against the assessments as wanton and lawless, but the Directors insisted on executing their plans, *although they agreed among themselves* no assessment of their stock *should be made.*

As an assessment was made by resolution adopted 7th April, 1873, and to be valid must be an equal assessment on all stockholders, it is not understood how *an agreement not to assess the stock held by the Directors could be made effectual.*

L. The defendants admit suits were brought against them by the company to enforce the payment of the assessment of one

and one-half per cent. levied on 7th April, 1873, as alleged in the petition, "and inasmuch as the assessments made, and threat-"ened to be made, involved the payment by them of *enormous* "*sums of money; and inasmuch as they had just reason to believe* that "*neither of them would derive any benefit therefrom, they were com-*"*pelled to make the compromise* set forth in the petition, to prevent "their ruin; and they charge that Attrill and the Board of Di-"rectors *used the process of the Courts to compel each of them to sac-*"*rifice his rights, or to submit to the illegal and arbitrary exactions* of "plaintiff and the Directors."

M. They admit they made the compromise alleged, and the stipulations by which the Crescent Company accepted the transfer of their stock, as set forth in the petition, but that the agreement to deliver up their stock in consideration of being released from liability for the assessments, and of the dismissal of the suits against them, was made in error of the facts; that within the year past, they have ascertained that Phipps, to whom they transferred their stock, was an agent of Attrill to "combine with the other Directors as herein before charged;" otherwise, they would have defended the suits, and would not have surrendered their stock. And they charge Attrill and the Board of Directors with concealment of the object and design of said assessments.

N. That within six months only, have they ascertained that Attrill and other northern capitalists had furnished the money to Phipps, to buy up the stock as soon as it could be forced on the market by the aforesaid illegal proceedings of the Directors, and that they were misled by Attrill's assertions constantly reiterated that he had bought the stock in the market fairly, and they *believed his statement until within six months past*, when they ascertained the truth of the matter.

O. That the amendatory act, approved July 10, 1873, is unconstitutional, but no ground is stated; nor was it legally accepted by the stockholders; the defect is not suggested; nor was the consolidation of the two companies consummated by parties who were authorized to bind them—in what respect the

agreement for consolidation is invalid the defendants do not intimate; nor was the New Orleans Gas Light Company competent to enter into the agreement for consolidation, but no reason is assigned; and that said agreement is null and void; the cause of nullity is left to conjecture.

P. That the franchises of the Crescent City Company are worth not less than $100 per share; they had only paid fifty cents per share when they subscribed for their stock; that they are entitled to the stock severally owned by them, "but that they have been illegally and cunningly deprived of it by Attrill, who has converted it to his own use, and that he has imposed the consolidation on the New Orleans Gas Light Company for the purpose of shielding the stock *illegally* obtained from them as aforesaid, and preventing a restitution of the same to them respectively," wherefore, the premises considered, they pray for judgment against Attrill, one defendant, claiming to be paid $355,000, and the other $115,000.

There are two fundamental questions to be discussed, either of which will dispose of the case, if the views entertained by the defendant in error are correct.

1. Does the demand in reconvention disclose a cause of action?

2. If a cause of action is set forth, does not the obligation to repair the injury arise from a tort or delict, or as we term it in Louisiana an offense or quasi offense? and if so, is it not prescribed by the lapse of one year, which is the term of limitation for such actions in Louisiana?

Before the trial of the cause on its merits, the plaintiff moved to strike out the demand in reconvention, because it disclosed no cause of action, the court referred that question as well as the plea of prescription to the merits. (See motion, p. 14, and the Order of the Court, p. 16.)

It is manifest from the various instructions given or referred, that the court below was of opinion that the demand in reconvention disclosed a legal cause of action, but that it was prescribed by one year as an offense or quasi offense. Nevertheless,

that question must be passed on by this court, for if the defendants in the court below were, under no circumstances, entitled to a verdict, it is immaterial what errors the Court below may have committed in the progress of the trial.

The writ of error brings up the whole case as it appears on the record.

Suydam vs. Williamson, 20 How. 427.

Ogle vs. Lee, 2 Cranch 33.

In U. S. Bank vs. Smith, 11 Wheaton, 173, the court said that the defendant, having the judgment of the court below in his favor, may avail himself of all defects in the declaration that are not deemed to be cured by the verdict. The same principle is recognized in McAllister vs. Kuhn, 96 U. S. 87.

I proceed then to discuss the question, whether the demand in reconvention discloses a legal cause of action; for the motion to strike out is equivalent to a demurrer.

Of course the demurrer admits only such facts as are well pleaded and it is not a confession of general allegations of fraud, because fraud is a conclusion of law deduced from facts.

Bank vs. Buckner, 20 How. 125.

Gilbert vs. Lewis, 1 De Gex Jones & S. 49.

Ross vs. Wood, 70 New York, 11.

Nor does a demurrer admit conclusions of law, nor matters of inference or argument.

U. S. vs. Ames, 99 U. S. 45.

What then is the substance of the complaint contained in the demand in reconvention?

1. That the defendants were induced to part with their shares of stock in the Crescent City Gas Light Company, in the month of May, 1873, in consequence of an assessment or call of one and one-half per cent. made by the Board of Directors, by resolution passed 7th April, 1873, and threats of additional assessments.

2. That in the opinion of the defendants, the proper policy for the Company to pursue was to await developments, and endeavor to get the city to exercise its option to buy the works of

the New Orleans Gas Light Company, and then purchase these works from the city on advantageous terms, and therefore any assessment was wanton, illegal and unnecessary.

3. Attrill having looked into the controversy between the two companies, and believing in the success of the Crescent City Company, purchased up a sufficient number of its shares to control its action and to elect his own friends as members of the Board of Directors; there is nothing illegal in a combination to elect a Board of Directors, 57 Ill. 416; having done this, he instigated the levy of the assessment of one and one-half per cent. in April, 1873, and gave out through the members of the Board, that other assessments would be levied if in their opinion necessary. Whether the assessments were necessary or not, I apprehend is a matter of administrative policy which this Court will not undertake to control, and therefore, I discard the allegation on that subject, as I do the allegation "that so important a step did not fall within the province of the directors under the circumstances in which they were placed. The charter vests the Directors with discretionary powers on the subject of assessments, and there is no allegation that they exceeded their powers.

Bailey vs. Railway Co., 12 Beav. 433.

New Orleans vs. Theatre Co., 2 Rob. La. 213.

4. That the Directors agreed among themselves that "no assessments of their stock should be made;" it is not alleged that such agreement was carried into effect, or that Attrill was a party to any such agreement, but if such an agreement had been made and carried into effect, the Company or any stockholder could have enforced the payment of the assessment.

Chandler vs. Brown, 77 Ill. 337.

Melvin vs. Lamar Ins. Co., 80 Ill. 461.

5. That the sole object of the assessment was to induce the stockholders to give up their stock for a mere nominal price, so that Attrill might get it; "for the Directors had made no arrangements to purchase property, to build gas works or to lay

pipes, and they had no serious design of doing either," but there is no allegation that the assessment of one and one-half per cent. was not necessary for other purposes, such as the payment of the enormous legal expenses incident to the controversy between the two Companies.

6. The defendants resist the assessment of one and one-half per cent.; they bring suits against the company in conjunction with other stockholders, and in their petition allege frauds and machinations of the officers of the company, as reasons for enjoining the collection of the assessment; the company sues them to enforce payment of the assessment, and a compromise is made by which they are allowed to transfer their stock, and obtain a release from the company of responsibility for all past, present and future assessments. This is the compromise set forth in the petition and which they admit by reference, p. 12.

7. They aver they were compelled to make the compromise to prevent their utter ruin—that is, it would have ruined them to pay assessments or calls on stock subscribed for by them, and this ruin was being brought about by a suit to compel them to comply with their legal obligations, and this ruin thus legally impending and staring them in the face, induced them to sell their stock, "inasmuch as they had just reason to believe that "neither of them would derive any benefit from" payment of assessments—that is to say, they had no confidence in the company's officers and agents, and therefore they would not trust them with the company's funds.

This was no reason to decline paying assessments.

12 Beav. 433; 5 Eng. L. and Eq. 171; 3 Macq. 799.

After having thus endeavored to escape all the responsibilities of a stockholder, and after the *litigation* with the old company was successful, and after the consolidation in 1875, the defendants discover they have lost a bonanza in surrendering their stock to the company under the compromise of 1873, and now claim damages for an alleged fraud practiced on them, to induce them to make the surrender.

I say the stock was surrendered in 1873, to the company, because the compromise was made with the officers of the company, and the transfer of the stock was made in blank on the books of the company, that is to say. to any person whom the company might accept, p. 3.

Having thus received all the advantages resulting from the compromise, can these defendants maintain an action for damages, whilst that compromise stands? Whether the Board of Directors had power to accept the surrender of stock, made by the defendants in May, 1873, and release them from all liability to the company for assessments levied prior to such surrender, as against creditors of the company, may be doubted.

Upton, Assignee, vs. Tribilcrex, 91 U. S. 54.

Burke vs. Smith, 16 Wall. 391.

Sparkman's case, 3 Eng. and Gr., App. 171; also, 249 and 263.

Nevertheless, the defendants have received the benefit of that compromise, and it stands unassailed; no creditor or other shareholder complains, and therefore, the compromise cannot be questioned in this suit.

Dixon vs. Evans, 5 Eng. and Gr. App. 618.

Bath's case, 8 Ch., Div. 334.

If the allegations of the petition are true, and they disclose a cause of action, it is an action for a deceit or fraud prcticed on the defendants by the company and its directors, at the instigation of Attrill; and as co-conspirators, all the parties, including the company itself, would be legally liable for the damages sustained by the defendants resulting from the alleged fraudulent conspiracy.

A corporation is liable for the deceit of its agents. The doctrine of Mr. Justice Willes, on this subject, as expressed in Barwick vs. English Joint Stock Bank, L. R. 2, Exchg. 259, is now considered correct. "In all these cases it may be said, as it was said here, the master had not authorized the the act. It is true he has not authorized the particular act, but he has put

the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

McKay vs. Commercial Bank, L. R. 5, P. C. 412.

Ranger vs R. R. Company, 5 H. L., Cas. 72.

Glasgow Bank, 5 App. Cas. 338.

In this last named case it was held that a corporation can not, of itself, be guilty of a fraud but where it can only accomplish the object for which it was formed through the agency of individuals who act fraudulently, the corporation stands in the same situation, with respect to the conduct of its agents, as a private person would have stood had his agent so misconducted himself.

Butler vs. Watkins, 13 Wall 463.

If this be true, then the company and its Directors and Attrill would be severally liable as tort feasors and participants in the fraud.

In such case a compromise with one tort feasor discharges all the others.

Lovejoy vs. Murray, 3 Wallace, p. 1.

Irwin vs. Scribner, 15 La. An. 583.

A compromise in Louisiana has the force of the thing adjudged. In the Louisiana Code a compromise is called a transaction. Art. 3078 declares that: "Transactions have between "the interested parties a force equal to the authority of the thing "adjudged. They cannot be attacked on account of any error "in law or any lesion. But an error in calculation may always "be corrected."

The compromise between the defendants and the Crescent City Company involved the validity of the assessments levied by the Board of Directors. The defendants desired to enjoin the assessments on account "of frauds and machinations of the officers of the company." The company insisted on payment,

and brought suit to enforce payment. The compromise embraced the dismissal of these suits, and the release of the defendants from liability for assessments on the surrender of their stock to the company.

This compromise stands as a judgment between the parties as to the matters embraced in it. It is a compromise as to the calls or assessments now assailed. The validity of these calls was involved in the suits instituted by both parties, and then settled, and it is a compromise as to the alleged frauds and machinations of the officers of the company. No new allegations as to the alleged frauds can prevent the compromise from having its effect as *res judicata*.

Phosphate Co. vs. Mollison, 4 App. Cases 801.

It is true a compromise may be rescinded for fraud or violence (Civil Code, Art. 3079), but until rescinded by a direct action instituted for that purpose it remains in force and *has its full effect*—it cannot be invalidated colaterally.

Able vs. Prudhomme, 16 La. 6; An. 344; and after the lapse of five years the action of rescission is prescribed.

Until the compromise is rescinded by a direct action, it must, like a judgment, be treated as conclusive of the matters embraced in it. They cannot be questioned colaterally.

I therefore submit that this suit, which is based on the fraudulent character of the assessments, cannot be sustained, in the face of the compromise, which it is now too late to attack or set aside.

It is well settled that a contract for the purchase or sale of property, in the making of which there is fraud, is not void but voidable.

In the language of Mr. Baron Parke, used in Stevenson vs. Newhouse, 76 E. C. L. 297, "the effect of fraud is not absolutely "to avoid the contract or transfer which has been caused by "that fraud, but to render it voidable at the option of the "party defrauded. The fraud only gives a right to rescind. in "the first instance, the property passes in the subject matter."

So in Tennent's case, 4 App. Cases, 620, Earl Cairns says, a contract induced by fraud is not void but voidable, at the option of the party defrauded, and this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded.

And it follows from this, says Lord Blackburn, in Glasgow Bank, 5 App. Cases, 338. "that though the deceived party may "rescind the contract and demand restitution, he can only do "so on the terms that he himself makes restitution. If either "from his own act or from misfortune it is impossible to make "such restitution, it is too late to rescind."

As this is clearly not an action to rescind the compromise made with the company, which is no party to this suit, I submit that so long as the compromise stands, it is for the reasons stated a bar to an action for deceit against the company, as well as all the other participants in the alleged fraud.

But what is the alleged fraud? Is it the levy of the assessment of one and one-half per cent accompanied by declarations of intention to make additional assessments? There was nothing unlawful in that. The levy of assessments for corporate purposes, by the terms of the charter of 1870, is left to the discretion of the Board of Directors. That discretion is not subject to judicial control, for the court will not interfere with the internal administration of the affairs of the corporation by its directors, except to restrain them from exceeding their powers or making calls for illegal objects. Brice Ultra Vires, p. 150–152, 568 (n); Dodge vs. Cowley, 18 How. 331; French vs Gifford, 30 Iowa 148; or to compel them to make calls on shares owned by them, corresponding to calls or assessments made on other stockholders. Preston vs. Collier Co., 11 Simons, 346. In this case the assessment of one and one-half per cent. was levied on all the stock of the company; it is so expressly averred in the answer, p. 9, and the reconventional demand p. 12.

The alleged agreement among the Directors "that the stock owned by them should not be subject to assessment," p. 9, or, as

it is expressed on p. 12, "that no assessment of their stock should be made," was a nullity, if made nor was it carried into effect, as the defendants elsewhere state, the "assessment was levied on the stock of the company," and this phrase is repeated, p. 12, that is, on all the stock of the company, including that of the Directors. The agreement among themselves not to pay the assessment, or to treat their stock as unassessed, is an absolute nullity and does not affect the validity of the assessment.

Here, then, is a perfectly legal act, done by persons competent to do the act, and legal means resorted to for the purpose of rendering the act effective. Can fraud and injury be predicated of such act and the use of such means? The act is lawful and the means are lawful. Does the allegation of combination, or conspiracy, or malice, change the character of the act or strengthen the case?

It is well settled that an act which does not amount to a legal injury, cannot be a ground of action, because of allegations of malice or evil intent.

O'Calligan vs. Cronan, 121 Mass. 114.

Adler vs. Fenton, 24, How. 409.

Bowen vs. Mathewson, 14 Allen, 499.

"An act which does not amount to a legal injury cannot be "actionable because it is done with a bad intent."

Stevenson vs. Nesonham, 76 E. C. L. 290.

There can be no action for the exercise of a legal right, whatever the motive. Bragg vs. Raymond, 11 Cush. 275.

Allegations of combination or conspiracy do not strengthen the case, and damages can never be recovered for a lawful act.

Randal vs. Hazleton, 12 Allan, 415.

Bradley vs. Fuller, 118 Mass. 240.

It was lawful for Attrill to endeavor, by the purchase of stock, to get control of the Board of Directors; this, it is alleged, he did, prior to the transfer of stock made by the defendants. It was equally lawful for him to secure the election

of a Board of Directors favorable to his views and policy. It was competent and lawful for the Board of Directors to levy an assesment on the stock of the company; it was lawful for the Board of Directors to endeavor to enforce payment of the assessments by legal process. The use of legal measures is no coercion, and the trial thereof no duress.

Bradford's Heirs, 11 Martin 219.

Woods vs Fitz, 10 Martin 198.

The Civil Code of Louisiana, Art. 1856, expressly provides that "if the violence used be only legal constraint or the threats "of doing that which the party using them has a right to do, "they shall not invalidate the contract. A just and legal im- "prisonment, or threats of measures authorized by law, and by "the circumstances of the case, are of this description."

In construing this article the Supreme Court of Louisiana said: "The motives which influence a person to exercise a legal "right, do not destroy that right or affect its enforcement."

Benner vs. Van Orden, 27 La. An. 479.

In speaking of compulsory payment, this court said, in the case of Radich vs. Hutchings, 95 U. S. 213, to constitute duress "there must be threatened or actual exercise of power pos- "sessed, or believed to be possessed by the party exacting or "receiving the payment over the person or property of another, "from which the latter has no immediate relief than by "making the payment. As stated by the Court of Appeals of "Maryland, the doctrine established by the authorities is "that payment is not to be regarded as compulsory unless "made to emancipate the person or property from an actual "and existing duress imposed upon it by the party to whom the "money is paid."

But if a party with knowledge of the facts, pays money in satisfaction of an unjust demand, he cannot afterward allege such payment to have been made by compulsion, and recover back the money, even though he should protest at the time of such payment that he was not legally bound to pay the same. "The reason of the rule and its propriety are quite obvious,

" when applied to a case of payment upon a mere demand of " money, unaccompanied with any power or authority to enforce " such demand, except by a suit at law. In such case, if the " party would resist an unjust demand, he must do so at the " threshold. The parties treat with each other on equal terms, " and if litigation is intended by the party of whom the money " is demanded, it should precede payment. If it were not so, " the effect would be to leave the party who pays the money the " privilege of selecting his own time and convenience for litiga- " tion; delaying it, as the case may be, until the evidence, which " the other party would have relied on to sustain his claim, may " be lost by the lapse of time and the various casualties to which " human affairs are exposed."

Boston Glass Co. vs. Boston, 4 Met. 187-8.

In this case it is alleged that the defendants and other stockholders remonstrated against the assessments " as wanton and lawless; " it is also alleged that these defendants, each of whom in turn had been President of the Company, " had just reason to believe that neither of them would derive any benefit " from the assessments in case of payment; and that the Company used the process of the Courts to compel them to submit to the illegal, arbitrary and unnecessary exactions of the plaintiff and the directors.

The process used by the Company was an ordinary suit at law, to enforce payment of a moneyed demand. The defendants resisted the assessments by an injunction suit, based on allegations " of frauds and machinations of the officers of said Company." What frauds and machinations were these, except in regard to the assessments sued for by the Company and sought te be enjoined by defendants?

Will a general allegation of ignorance that Phipps was the purchaser of this stock, or that Phipps was the agent of Attrill, or a general allegation of concealment of the object and design of the assessments help the case of the defendants?

Will the general allegation that the defendants were misled by the assertions of Attrill, " constantly reiterated, that he had

bought the aforesaid stock in the market fairly and in good faith, and that they each believed his statement until within six months past, when they ascertained the truth of the matter in relation to the conduct of Attrill and the said Board of Directors," etc., will such general allegation help the case? Here then, is an admission by defendants, first, that they had known for a much longer time than six months previous to this suit, that Attrill had become owner of their stock; and second, that for about six months they knew all the facts which their demand in reconvention discloses; this demand in reconvention was filed 30th June, 1875; yet they stood by and allowed the consolidation of the two Companies in April, 1875, to be carried into execution, and on the very day of its final consummation they give the New Orleans Gas Light Company notice that they were defrauded of their stock "by the fraud and machinations of the officers of said Company." It is a little remarkable that the language of this notice in April, 1875, corresponds with that of the injunction suit instituted by these defendants on 6th May, 1873, and wherein "the frauds and machinations of the officers of said Company" constitute the basis of the suit.

There is no allegation of *concealment* except as to the alleged *object and design of the assessments*, p. 13. There is an allegation of ignorance as to the alleged *conspiracy*, p. 9, and as to the alleged agreement among the directors that the stock owned by them should not be subject to assessment, p. 9; and there is an allegation that, within six months past they *ascertained* the truth in regard to Attrill's conduct, although they knew some time before —how long is not mentioned—that he had become owner of their stock. It is evident, therefore, that there was no concealment of Attrill's ownership of stock.

There is no allegation that inquiries were instituted or that any diligence was used to obtain information; concerning Attrill's ownership, or the alleged frauds, there is no allegation as to the precise time when, nor from whom, nor by what means, they finally obtained information relative to the fraudulent scheme or conspiracy. That *they had good reason to believe in the*

existence of frauds and machinations on the part of the officers of the company in relation to the assessment is manifest from their petition for injunction, filed and sworn to on 6th May, 1873, if we may believe the allegation on p. 12 that "they had just reason to "believe that neither of them would derive any benefit" from said assessments. This is supported by the allegation "that no "arrangements had been made to purchase gas works or to lay "pipes, and they had no serious designs of doing either" No ignorance of those facts is alleged. When the compromise was made, it was entered into, as alleged, to avoid "illegal, arbitrary and unnecessary exactions," p. 12. This is an averment that the assessments were illegal, arbitrary and unnecessary, and they were aware of these facts at the time of the compromise.

Knowledge of facts, which reasonably create belief of fraud, is knowledge of the fraud.

Martin vs. Smith, 1 Dillon, 85.

The general allegation of concealment amounts to nothing Badger vs. Badger, 2 Cliff. 155.

Especially where there is no allegation that the defendants had not possession of the means of discovering the alleged fraud, for the possession of such means is knowledge itself.

Albany vs. Burke, 11 Wall. 107.

Slaughter vs. Green, 13 Wall. 384.

In Wood vs. Carpenter, 101 U. S. 141, and National Bank vs. Carpenter, 101 U. S. p. 567, this Court says, that there is no averment that the plaintiffs ever made or caused to be made any inquiry. So there is no such averment here. In those cases there was a general allegation of concealment, and that he (the plaintiff), "had no knowl- "edge of the facts so concealed by the defendants until the "year 1872, and a few months only before the bringing of this "suit." The Court held the allegation insufficient, and decided that there must be "distinct averments as to the time when the "fraud, mistake, concealment or misrepresentation was dis- "covered, and what the discovery is, so that the Court may "clearly see whether by ordinary diligence the discovery might "not have been made before."

The court in those cases sanctioned the doctrine that silence was not concealment; there must be something more to prevent discovery: "there must be some trick or contrivance intended "to exclude suspicion and prevent injury."

The court also say: "A general allegation of ignorance at "one time, and of knowledge at another, are of no effect. If the "plaintiff made any particular discovery it should be stated "when it was made, what it was, how it was made, and why it "was not made sooner."

These cases also show that this defence is good, both at law and in equity, and may be raised by demurrer.

I am now applying this doctrine to the right of the defendants to assail the compromise, and the transfer of stock made by them as part of the compromise. The discussion will be renewed when I approach the question of prescription.

My contention is, that the demand in reconvention exhibits a case, where the assessment now charged to be fraudulent was questioned in 1873, in a law suit between the defendants and the company on the ground of fraud, and where the parties were then in possession of the means to protect themselves, and where they had such knowledge of the facts as to lead them to believe the assessment was wanton, illegal, lawless, unnecessary and arbitrary; such are the adjectives used in the reconventional demand to characterize the assessment.

Under such circumstances they compromised with the company, and surrendered their stock to the company, which accepted Phipps, the agent of Attrill, in lieu of the defendants.

They remain silent for two years, and until the company's success is established by Attrill's exertions and those of his friends, associates and agents, and at their expense, and then, upon an allegation of undiscovered fraud, they seek to recover damages to the amount of $490,000 for a deceit which induced them to part with stock on which only fifty cents per share had been paid.

Finally, let us suppose for the purpose of argument, that the deceit alleged in the reconvention, was properly stated and

in itself constituted a good ground for the recovery of damages. The question which presents itself is, whether that deceit, as alleged, was the motive for the surrender or transfer of stock made by the defendants.

If it was not, no damages can be recovered on account of it. For the specific act of levying the assessment of one and one-half per cent. produced no direct and immediate damage; it was undoubtedly a necessary step in order that Attrill and his associates might practice the alleged fraud or oppression, but it was not the immediate cause of the injury; the substantial, efficient and immediate cause of the transfer of the stock was, as alleged by defendants, an apprehension that "inasmuch as the assess-"ments made and threatened to be made involved the payment "of enormous sums of money, and inasmuch as they had just "reason to believe that neither of them would derive any benefit "therefrom, they were compelled to make the compromise," etc.

Whether the assessments were levied for legitimate purposes or not, was, in point of fact, a matter of indifference to them. They were unwilling to pay any assessments whatever, because the sums demanded were large, and they had no confidence in the Board of Directors charged with the power and duty of expenditure.

The motive, "*dans locum contractu*," was, in fact, the apprehension of improper management on the part of those who levied the assessments. It was an apprehension that the defendants would derive no benefit from the payment of money into the hands of such a Board of Directors, and if that was the motive for selling out their stock, the defendants have no ground of complaint; for such apprehension existed independently of the assessments, the unreality of which is the gravamen of this demand in reconvention.

Pulsford vs. Richards, 17 Beav. 96.

SECOND POINT.

If the demand in reconvention discloses a cause of action, is not such cause of action embraced in the category of torts or offenses or quasi offenses, and as such is not the prescription of one year an absolute bar to it?

This question is presented on the plea of prescription, filed before the trial on the merits, and in a modified form by the bills of exceptions, pp. 23 and 25.

It appears from one of the bills of exception, just mentioned, that the court charged the jury, "that the causes of action set up by the defendants under the reconventional demand are quasi offenses," but refused to charge that these causes of action were barred by the lapse of one year, from 15th and 22d of May, the dates of the respective transfers of the stock surrendered by the defendants.

The court admitted that the prescription of one year was applicable to the case presented by the demand in reconvention, but charged the jury that if the fraud alleged was established, and the fraud had been concealed by Attrill, the prescription of one year commenced to run after the concealment ceased to operate.

In the other bill of exceptions, the defendants sought from the court an instruction to the jury to the effect that the damages claimed in the reconventional demand "arose out of a contract of sale between J. H. Oglesby and Jules Cassard, on the one part, and plaintiff or his agents on the other, and that the prescription of one year does not apply," but the court refused to give it.

We will now consider the following questions:

A. The nature of the cause of action disclosed in the demand in reconvention.

B. The plea of prescription of one year.

C. The time when the prescription commences to run, whether from date of sale or date of cessation of concealment.

A. The nature of the cause of action.

This is not a suit to rescind the sale of the stock, but for damages resulting from a deceit practiced on the defendants, whereby they were induced to surrender or transfer their stock. This deceit was practiced, it is alleged, by means of a conspiracy between Attrill and his Board of Directors, he having induced them to make ficticious assessments on the stock of the company, for the purpose of frightening the defendants into a surrender of their stock. It is alleged that by means of this conspiracy, the defendants "have been illegally and cunningly de-" prived of their stock by the said Attrill, and that he has con-" verted it to his own use" etc.

If this were a suit to rescind the sale it could be accomplished by bill in equity only, which must be accompanied by tender of the price paid. It can be, therefore nothing but an action of damages for a deceit.

In cases of this sort, there are only two remedies—one in equity to rescind the contract, and the other at law to recover damages for a deceit.

Atwood vs. Small, 6 Clk. & Fin. 395.

R. R. Co. vs. Hirsch, 2 Eng. & Irish App. 121.

Clarke vs. Dickson, 96 E. C. L. 154.

In Glasgow Bank case, 5 App. Cases, 338, Lord Blackburn says:

"I do not think there is now any doubt that where a con-" tract is, in the language of the English common lawyers, in-" duced by fraudulent deceit of the other contracting party, or of " one for whom he is responsible, or in the language of the Civil " Law, when there is *dolus dans locum contractui*, the contract is not " void but voidable. And it follows from this that though the de-" ceived party may rescind the contract and demand restitution, " he can only do so on the terms that he himself makes restitu-" tion. If either from his own act, or from misfortune, it is im-" possible to make such restitution, it is too late to rescind. But " though he cannot rescind, he may, at least, in English law, as

"against the person actually guilty of the fraud, recover damages. "Clarke vs. Dickson, and Cole vs. Bishop, mentioned in that case "by Justice Earle."

See also Miller vs. Barker, 66 N. Y. 565, and Schiffer vs. Deitz, 83 N. Y. 308.

In this case the fraudulent intent is essential to the maintenance of the suit, and the scienter is the ground of the action. So it is in all actions for deceit or conspiracy to deprive the plaintiff of some property or advantage, and to acquire it for the defendant.

Butler vs. Watkins, 13 Wall. 46.

Henderson vs. Lacon, L. R. 5 Eng. Cas. 261.

Even where an agent who was charged with the duty of purchasing, on behalf of himself and others, a banking establishment and its assets and liabilities, so conducted himself as to bring great losses on himself and associates, Lord Chancellor Hetherly held that any liability for loss, beyond the amount of capital invested, could only be enforced by an action at law, on an allegation of fraud, and in such case, as the agent was dead, his executors could not be pursued at law, for *the tort would be personal.*

Gurney vs. Gurney, L. R. 4 Ch. App. 710.

A tort at common law is similar in nature to an an offense or quasi offense, as defined by the Civil Code of Louisiana.

The Code, in Art. 1756, declares that: "An obligation is, in its general and more extensive sense, synonymous with duty." There are five sources of obligations:

1. Contract.
2. Quasi contract.
3. Offense.
4. Quasi offense,
5. The operation of the law.

There are two elements necessary to constitute an obligation. 1. The juris vinculum by which an obligor can be sued in a court of justice, and be compelled by the public force to

comply with his obligation. 2. It must exist between one or more determinate persons on the one side, and one or more determinate persons on the other side; that is to say, it is essentially individual and relative, and is, therefore, not to be confounded with general duty to society.

It is true, there is an obligation not to assail a man's person or property, which is guaranteed by the public force, so that the injured party can invoke the penal code, as well as the aid of the civil courts to punish the offender; but this is an obligation common to all persons and is of a negative, not a positive character, and which does not bind one determinate person to another determinate person; but on the contrary, is obligatory upon all persons towards one another. That is to say, this obligation, which is called social duty, is only the respect which is due to real rights whose existence is independent of all personal obligations, properly so called.

"A contract is an agreement by which one person obligates himself to another, to give, to do, or permit, or not to do, something expressed or implied by such agreement." Civil Code, Art. 1761.

"Quasi contracts are the lawful and purely voluntary acts of "a man, from which there results any obligation whatever to a "third person, and sometimes a reciprocal obligation between "the parties." C. C. Art. 2293.

The illustrations of quasi contract, are the obligations arising when a man of his own accord undertakes to manage the affairs of another; the obligation of him who receives what is not due, to restore it. All the equitable doctrine, that no man should enrich himself at the expense of another, comes under this head.

Obligations resulting from the operation of the law, are the obligation to pay taxes, the obligation to allow your neighbor, in cities, to rest six inches of his wall on your own land, as prescribed by Art. 675 of the Civil Code, etc.

Offences and quasi offences are thus defined in the Civil Code and Code of Practice:

Civil Code, Art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Civil Code, Art. 2316: "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill."

Code of Practice, Art. 31: "Personal actions arise from offences where one has become liable to another for the injury he has inflicted on him by some crime or offence, such as theft or slander."

Art. 32: "Personal actions arise from quasi offences where the ground of action is the *injury* done to another by one of those faults which are not considered as real crimes or offences."

Contracts and quasi contracts are the result of lawful acts; offences and quasi offences spring from unlawful acts; an offence arises where the offender intended the wrong; a quasi offence where the injury was unintentional.

The distinction between the two (says the Court, in Edwards vs. Turner, 6 Rob. 384) appears to be, that offences are "those "illegal acts which are done wickedly and with intent to "injure, while quasi offences are those which cause injury to "another, but which proceed only from neglect, error or im-"prudence" See also Slidell, J., in Black vs. R. R. Co., 10 La. An. p. 43. He says: "I understand by the word offence, as "used in our Code, every act of a man done with the intention "of injuring another, and violating the laws or offending social "order. * * * By the word quasi offence, as used "in our Code, I understand an act by which one person without "malicious intention, but through imprudence, causes damage "to another. * * The Civil action for both causes is "given by the same article of our Code, Art. 2315"

See also City of New Orleans vs. Southern Bank, 31 La. An. 566.

The quasi contract is not the implied contract of the Common law; for the implied contract, presupposes the request of the party who receives the benefit. Whereas, the quasi contract proceeds on the idea of benefit actually received, without the request of the party who enjoys it. An heir benefited by a third persons' payment of the ancestors debts, must reimburse the amount, although payment was not made at his request.

Lyon vs. White, 8 La. 499.
Atery vs. Bell, 2 R. 225.

It is therefore plain that the offence or quasi offence of the Civil law, is similar in character to a tort at Common law. A tort is described by the English Common law procedure act as "a wrong, independent of contract." 15 and 16 Victoria C. 76.

A suit for damages for fraudulently aiding a debtor to remove property, to defeat an attachment is an offence in Louisiana.

Irish vs. Wright, 8 R. 428.
Smith vs. Berwick, 12 R. 20.

So a conspiracy to prevent a person from obtaining employment.

Home Insurance Company vs. Ord, 12 La. An. 255.

An action for deceit, or false representations to induce the purchase of a thing is an action in tort.

Fisher vs. Mellen, 103 Mass. 503.

So concealing a debtor's property from the pursuit of creditors is an offence.

Gardner vs. Scherer, 31 A. 528.

Now, whether the wrong described in the demand in reconvention be an offence or quasi offence is immaterial, because both classes of obligations are subject to the prescription of one year.

This prescription began to run from the date of the offence.

Gardiner vs. Schrer, 31 A. 329.

The Partidas provided that "he who has been defrauded may bring suit for reparation, at any time within two years from the day the fraud was committed.

Partidas, 7 tit. 16 L. 6.

But actions for trespass or torts must be brought in one year. Partidas, 7 tit. 9 L. 22.

On this subject, the Code of Louisiana provides as follows:

"The following actions are also prescribed by one year:

"That for injurious words, whether verbal or written, and that "for damages caused by animals or resulting from offences, or "quasi offences." C. C. Art. 3536.

"The prescription mentioned in the preceding article runs: "with respect to merchandise injured or not delivered from the "day of arrival of the vessel, etc.

"And in the other cases from that on which the injurious "words, disturbance or damage were sustained."

In the case just cited from 31 La. Annual R. 329, the Court held that prescription runs from the date of the offence.

So in Wartelle vs. King, 10 La. An. p. 656, the Court says "by article 3501 (now 3536) of the Louisiana Code, actions sound-"ing in damages for torts are prescribed by one year. This "year must be computed from and after the day of the commis-"sion of the tortious act, unless the act causing the damages be a *continuing* act, then the year runs from the time the damage is sustained. Mestier vs. R. R. Co., 16 La. An. 356.

The taking a man's property illegally without his consent is a tort, and a suit to recover its value is prescribed by one year.

Williams vs. Granier, 20 La. An. 151.

And the character which the plaintiff gives to his action by his pleadings must govern in determining the prescription applicable to it. "The defendant is charged with having taken "and appropriated to his own use the property of plaintiff with-"out right, title or legal claim whatever. It was, therefore, a

" wrong, or offence. It was the taking or appropriating plain-
" tiff's property without his consent which caused him damage
" to the amount of the value of the property, and this amount as
" fixed by him is claimed in this suit, and as the evidence shows
" that the act complained of was committed more than one year
" prior to the institution of this suit, the prescription
" pleaded is applicable and must be sustained."

Burch vs. Miles, 21 La. An. 492.

Also, Lockwood vs. Quackenbush 83 N. York, 608.

To the same effect is Foley vs. Bush, 13 La. An. 126. So in Lutz vs. Forbes, 13 La. An. p. 609, it was held that the prescription appliable to an action for damages growing out of a fraud practiced in the sale of a horse, affected with a contagious and incurable disease, which spread among and caused the death of other horses of the purchaser, is that of one year, under article 3536 of the Code.

So the unwarrantable and illegal taking possession of a railroad, and appropriating its iron and other materials to defendants' use, is a tort prescribed by one year.

Harper vs. Municipality, 12 La. An. 366.

So in Wood vs. Harrispe, p. 26 La. An. 572, the Court say: " If this possession was a wrongful one, as it is alleged to be, the " property came into his hands by reason of an offence which he " through his agent had committed. His obligation towards the " plaintiff would rest upon a claim for damages caused by tor-" tious conduct, and is the result of an offence prescribed by one " year."

The court below, in its charge to the jury on the subject of prescription, applied the principle incorporated in our Code in regard to suits brought to annul or rescind contracts for fraud. An action to rescind an agreement for error or deception, is prescribed by ten years, to commence, "in case of error or deception, " from the day on which either was discovered."

C. C. Art. 2221.

This article is found under the title of the code which treats of "conventional obligations," and in the section which treats "of the action of nullity or rescission of agreements."

The action to rescind an agreement for fraud is prescribed by ten years (Mulford vs. Wimbish, 2 La. An. 443), and the time only commences to run from the discovery of the fraud.

But an action for damages resulting from a fraud is an offense prescribed by one year, and there is no qualification as to the time at which the period of prescription commences to run, except that mentioned in Art. 3537, to-wit: From the day "on which the injurious words, disturbance or damage were sustained."

Now, in this case, the damage was sustained, and the alleged fraud had produced its effect in May, 1873, when the defendants surrendered and transferred their stock. Although a suit to rescind the transfer is only barred by the lapse of ten years from the discovery of the fraud, yet an action in damage for the deceit, is prescribed by one year from the day the stock was transferred. The Court, therefore, had no authority for importing into the jurisprudence of Louisiana, a qualification of the doctrine of prescription as to torts, such as we find in the instructions to the jury; and hence the defendants have no cause of complaint, as the instruction was more favorable to them than it ought to have been.

Our Code declares "that prescription runs against all persons unless they are included in some exceptions established by law." C. C. 3521.

In Stewart's Case, 21 La. An. p. 77, the Supreme Court of Louisiana deliberately overturned the doctrine of *contra non valentem*, and from that day to this, it has been the accepted jurisprudence of the State. No exceptions are allowed which are not enumerated in the Code.

The decision in Stewart's case, was to the effect that our law recognized no exception to the rule by which an action for

an offence or quasi offence is prescribed by one year; the prescription in such case ran against every one, even against minors, persons interdicted, and persons residing out of the State.

This was followed by decisions that prescription ran against the State, no express exception having been made by the Code in her favor.

Gibson vs. Tignier, 23 La. An. 571.

State vs. White, 23 La. An. 733.

The Court went further and held:

While a case is pending on appeal from the judgment of the inferior court, that prescription is running against the judgment, so that if the judgment is affirmed, on appeal, after the lapse of ten years from its rendition in the Court below, the creditor cannot enforce it; it is extinguished by prescription.

Durell's case, 21 La. An. 295.

This rule was applied to a judgment, the execution of which was suspended by an appeal bond and supersedeas.

Walker's case, 23 La. An. 176.

This was followed by a decision that the restraining of the execution of a judgment by a writ of injunction, sued out by the judgment debtor, does not interrupt the current of prescription on the judgment enjoined.

Yales' case, 23 La. An. 579.

This doctrine was reiterated in Smith vs. Palfry, 28 La. An. 616, and in Zacharie's Succession, 30 La. An. 1262.

In the case of Sherwood vs. Sutton, 5 Mason, 151, Judge Story doubts the policy of allowing exceptions to the statute of limitations not provided for by law, and says the practice was borrowed from the English Courts in exposition of the statute of 21 James I; as that statute furnished the basis of limitation in the colonies, the exceptions, as adopted in the English Courts, became part of the law.

But the common law and its history have no influence on our Louisiana system of law; the Code Napoleon excludes all exceptions not expressly provided for, and our Court, in Steward's case, 21 La. An. 78, expressly adopts the French rule, and rejects the line of decisions in the common law States to the contrary; and the Court reaffirmed this doctrine in the subsequent cases in 23, 28 and 30 La. An., which are local and domestic cases.

Such was the law at the time this suit was instituted in the State Court, and at the time of its removal in June, 1875, and at the time of its trial in 1879, and such is the law now. Being thus established, it must control this case in the Federal Courts.

Patterson vs. Gaines, 6 How. 550.

"That the acts of limitation furnish rules for decision, and "are equally as binding on the Federal Courts as they are on "the State Courts, is not open to controversy."

Bank of Alabama vs. Dalton, 9 How. 527.

3 Pet. 270.

13 Pet. 45.

Leffiingwell vs. Warren, 2 Black, 599.

In the case of Bailey vs. Glover, 21 Wall. 343 the Court recognizes the rule as to State statutes, but not in the construction of a statute of limitation passed by Congress as part of the bankrupt law.

I think, therefore, that the plea of prescription should have been maintained.

If, however, the qualifications of the rule mentioned in the Bills of Exceptions are to be considered, derived as they are from the Court of Chancery, the defendants cannot complain of the instructions of the Court on the subject of prescription.

The foregoing discussion disposes of that Bill of Exceptions which sought from the Court an instruction, "that the "damages claimed in reconvention arise out of a contract of sale "between Oglesby and Cassard on the one part, and the plaintiff "or his agent on the other, and that the prescription of one

" year does not apply," p. 25. There are two propositions in this instruction, to which one the bill was reserved does not appear; although the damages might arise out of a contract of sale, it by no means follows that the prescription of one year did not apply.

"The redhibitory action must be instituted within a year at " the farthest, commencing from the date of the sale." C. C. Art. 2534.

So in the Bill of Exceptions, p. 23, the Court was asked to instruct the jury that the reconventional demand was a claim for the value of the property, to-wit: a claim by Oglesby, for the value of 3550 shares of stock of the Crescent City Company, and a claim by Cassard for 1150 shares, and not a suit for damages within the meaning of Art. 3536 of the Civil Code, and the prescription of one year does not apply. This instruction the judge refused to give, and stated that he would set forth the law which governed this part of the case in his connected instruction.

Now, the Court was not bound to give the instruction asked in the language of that instruction, and although the reconventional demand might contain a claim for the value of the shares of stock, it by no means follows that the suit is not one for damages within the meaning of Art. 3536 of the Code, and therefore prescribed by one year.

In several of the cases cited by me, a claim for the value of property tortiously taken possession of and appropriated, was held to be an action for a tort or an offense.

20 A. 151; 25 A. 410; 21 A. 492; 21 A. 511.

The connected instruction which the judge gave on this subject is found at pp. 23–4. He instructed the jury, that the causes of action set up in the demand in reconvention were quasi offences, and barred by one year; but the year did not commence to run from the date of the sales of stock in May, 1873. Whether the claim was barred in June, 1875, depended on the fact whether or not "the plaintiff, by any acts or hindrances of his, prevented

" the defendants from knowing either that they had been de-
" frauded or that he, the plaintiff, was the person who had pur-
" chased their stock and had defrauded them. In order to pre-
" vent the statute of prescription from running, it is not sufficient
" that the defendants have established merely that they were
" ignorant as to who was the purchaser of the stock and of the
" alleged fraud. They must have established the fact that by
" some method or way, originating from the plaintiff, he, or those
" who were his agents, concealed and kept the defendants in
" ignorance of either the fact of the fraud, or that the plaintiff
" was the author of it."

If there was no such concealment, the cause of action arose at the time of the sale of the stock, and since the reconventional demand was filed, more than one year after that time, the cause of action is prescribed, and the verdict must be for the plaintiff.

On the other hand, the judge said: "If you find that although
" the cause of action arose at the time of the sale of the stock,
" yet, by reason of the acts of hindrance of the plaintiff, the de-
" fendants were kept in ignorance as to the fraud or its author,
" down to a time subsequent to that of the sale, then it will be
" for you to say how long this period of concealment lasted; and
" if you find that it continued so long that the defendants did
" not learn of the fraud or its author, until a period of one year
" prior to the time when they filed their reconventional demand,
" then their demand is not prescribed. On the other hand, if
" there was a concealment, but that it did not continue so, but
" that for more than one year prior to the time when defendants
" filed their reconventional demand they knew as to the fraud,
" and that the plaintiff was its author, then the cause of action
" on the part of the defendants against the plaintiff would be
" prescribed."

To which refusal, to give the charge requested, and to the charge of the court as given, defendants excepted.

Now, what propositions in the charges given did the defendants except to? Here is a long instruction, involving many

propositions, and the exception is taken to no particular part of the charges, but to the instruction in globo.

If any one of the propositions contained in the charge of the Court be correct, the exceptions will be overruled.

Johnston vs. Jones 1 Black. 220.

Rogers vs. Marshal. 1 Wall. 645.

Harvey vs. Tyler, 2 Wall. 328.

U. S. vs. Hough, 103 U. S. 73.

The doctrine as to concealment, announced in the instruction, is more favorable to defendants than the views of this Court on that subject in Wood vs. Carpenter, 101 U. S. 141. That the cause of action disclosed in the demand in reconvention was a tort or offence, or quasi offence, and as such, subject to the prescription of one year, has been discussed.

The residue of the argument will be confined to specific legal questions raised by the bills of exception :

1. Bill of Exceptions, p. 20. The question raised in this bill is germane to that presented by Bill of Exceptions at pp. 33-4; and therefore the two bills will be considered together.

The latter bill, after setting forth the levy of the assessment of one and one-half per cent. on the capital stock of the Crescent City Gas Company, by resolution adopted April 7th, 1873, in which the avowed purpose of the assessment, as expressed in the resolution, was the purchase of real estate for the location of the works and other buildings of the Crescent City Gas Company, proceeded to state that the plaintiff offered a deposition of F. J. Herron, "tending to show a *different and an additional object and* "*purpose* of said assessment, from that expressed in the resolu- "tion, to-wit: For the purpose of supplying funds to carry on "a legal contest in which the said Crescent City Gas Light "Company was engaged with the New Orleans Gas Light Com- "pany, to fix said first named company in its rights, and to "establish the legality of its charter, and which legal contest "had been pending prior to said Attrill becoming interested in "said Crescent City Gas Light Company, and prior to the elec- "tion of the said Wybray Board of Directors."

The defendants objected to the introduction of the deposition, on the ground "that it was not competent to produce evi-"dence showing a different object and purpose of said assessment "of one and one half per cent. levied on 7th April, 1873, as afore-"said, from the object and purpose expressed on the face of the "resolution levying the same, and different from the object and "purpose of said assessment as expressed in the suits in which "defendants had been sued," etc.

In the Bill of Exceptions, at p. 20, the Court was requested to instruct the jury that if they find "from the evidence that the "assessment of one and one-half per cent. levied by the Wybray "Board on 7th April, 1873, was levied with a different intent, "and with a different object from that which was expressed on "its face, that it was a deceit and fraud on the stockholders, and "if they believed from the evidence that the defendants were "induced to part with their stock by such false representations, "then they were entitled to recover."

The Court refused this instruction, saying: "It is not enough "that the avowed purpose of the Directory was different from "the real purpose. The jury must further find that the purpose "was a *fraudulent purpose*."

By referring to Bill of Exceptions, page 32, the Court will perceive that the Judge did instruct the jury that if "the assess-"ment of one and one-half per cent., or the threats of future "assessments, were levied and made for the fraudulent purpose "of inducing the defendants to sell their stock to the plaintiffs, "and not for legitimate purposes connected with the corpora-"tion, and that this was done by the procurement of the plain-"tiff, in his interest, or by his agents," the defendants were entitled to recover such damages as they may have sustained.

It seems to me that this was all the defendants could ask the Court to say. It was the pith of their case.

Not satisfied with that, they insist that the assessment was fraudulent, if the purpose for which it was needed was different to that expressed on the face of the resolution making the levy.

Such a contention is groundless, when it is considered that this is an action for a deceit, based on the allegation that the assessment was a *sham*, and not needed for any legitimate purpose, and not real, and not intended to be enforced to raise money for any purpose.

The Board need not have expressed any purpose in the resolution making calls on the stockholders for money, and any legitimate purpose will denude the act of any fraudulent character. It is the illegal sham which is the foundation of the alleged fraud. The act is real and legal if the call was for a real and legitimate purpose, irrespective of the method of making the call.

2. Bill of Exceptions, p. 30 to 32, desired the Court to mantain the doctrine that the receiver of the benefits of a fraud, not committed by him or his agents, is not only responsible for the fraud to the extent of the benefits received, but that he is liable for damages, to the same measure and to the same extent as if he was an *active participant* in the fraud.

The court instructed the jury that if the assessments were fraudulent, and the defendants were thereby induced to part with their stock, and that this was done "by the procurement of the plaintiff in his interest and by his agents," he was responsible for whatever damages the defendants sustained.

I remark, that the instructions given, and the instructions refused, contain several propositions; they are excepted to in general terms, and therefore, if any one proposition be correct the Bill of Exceptions must be overruled.

The instruction given by the court is favorable to the defendants and cannot be complained of by them.

Now, the instruction refused by the court is erroneous.

1. Because it ignores all other questions in the case; the jury might find all the facts stated in the instruction, and yet, if the claim of the defendants were prescribed, they were not entitled to recover any damages whatever.

2. Because the instruction omits the important fact of agency or the participation of Attrill in the alleged conspiracy by himself or his agents, or by those for whose conduct he was responsible.

If the Board of Directors who levied the assessment were strangers to Attrill, and none of those occupied towards him the relation of agent, he is not responsible for their frauds because he happened innocently to receive the benefits thereof.

If the Board of Directors, or some member of it, were Attrill's agent to represent him in the Board, and to conduct the affairs of the corporation for him, his liability for frauds committed by his agent, without his knowledge or consent, could not extend beyond the amount of the benefits received, or the advantages reaped; whereas the liability of an *active participant* in the fraud is much more extended.

As a general rule, to found an action for deceit the fraud must be a personal one on the part of the person making the representation, or some fraud which another person has impliedly authorized him to be guilty of.

Kerr on Fraud, p. 326.

Railroad Company vs. Conybeare, 9 H. L. Cos. 711.

Bank vs. Addie, 1 Scotch App. 162.

Henderson vs. Sheer, L. R., 5 Eq. 262.

It is true that the case alleged in the demand in reconvention, is a case of an alleged fraud knowingly committed by Attrill, and the Board of Directors and the corporation.

But, if Attrill is innocent of the fraud, his responsibility for the conduct of the Board of Directors, if it exist at all, will be limited by the benefits realized by him. If he cannot in such case, shield himself from responsibility entirely on the ground that he never authorized the acts done, and was not cognizant of the fraudulent purpose, his responsibility is satisfied by restoration of the fruits of the fraud, of which he had no guilty knowledge, and in which he was not a participant. Our law distinguishes between the actual wrongdoer, and persons who, on

account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his agent.

Kune vs. Lizardi, 8 La. 33.

3. Bill of Exceptions, pp. 25 to 28, as to the measure of damages; and a similar bill, pp. 37, to 40.

In these bills, it appears the instructions given and refused contain several propositions, but no objection is made to any specific proposition; and therefore, if any of the propositions be correct, the exceptions cannot be sustained.

As to the first bill (p. 27), the Court was asked to instruct the jury that if they believed the defendants were induced to sacrifice their stock by the fraudulent conspiracy alleged, they were entitled to recover "the highest price known to have been assessed for their shares of stock—to-wit, $41 66⅔," etc.

The Bill of Exceptions shows there was no evidence tending to establish that "these shares" of the Crescent City Company ever sold for $41 66⅔. The highest market price was $4, but Attrill, in 1875, by virtue of the agreement of consolidation, received shares in the consolidated company, in exchange for shares of the Crescent City Company. The value of the consolidated shares thus received in exchange for the shares of the Crescent City Company, was equivalent to $41 66⅔ for every share of the latter company.

The Court refused to instruct the jury that defendants were entitled to recover $41 66⅔ for each share of Crescent City stock, less the deductions specified in the Bill of Exceptions.

The Court charged the jury as follows:

A. The measure of damage is the value of the stock at the time the defendants were fraudulently induced to part with it by plaintiff, less fifty cents per share he paid for it.

B. In determining the value of the stock much discretion is left to the jury; they must find such damages as will fully indemnify the defendants.

C. If the stock, at the time of the sale, had a definite market value, unimpaired by the plaintiff, they should adopt that; but, if it had no ascertainable market value, owing to the fraudulent acts of the plaintiff, or to the litigation then going on respecting the franchises of the company, but had an intrinsic value, then they must take into consideration all the circumstances of the case, the value of the franchise, the situation of the legal questions; the fact that these questions were decided in favor of the Crescent City Company, and on the other hand, the efforts of the plaintiff, and his expenditures, to bring about success, and enhance the value of the stock, and the value or amount subsequently realized by the plaintiff from the stock, and then say what is the just amount of damages the defendant should recover.

This instruction was more favorable to the defendants than it should have been, and gave the jury a wider latitude than they were entitled to.

What part of this instruction is objected to? No one can tell from an examination of the bill.

The Bill of Exceptions at pp 39 and 40, is precisely similar to the one just criticised, except that the Court was asked to instruct the jury, that if the defendants were defrauded of their stock, the damages to which they were entitled, "was the amount of loss they had sustained and of the profits of which they had been deprived;" this was refused, the Court saying it had already stated the principles of law which should govern the jury on this subject.

This bill does not set forth any specific objection to the many propositions contained in the instructions given. As to the instruction refused, the Court was right in so complicated a case not to allow any general truism on the subject of damages to go to the jury as the law of the case.

4. The Bill of Exceptions, p. 29—the defendants objected to the deposition of Herron, offered to show that Oglesby had never paid for three thousand shares of stock subscribed for

by him; that he derived his knowledge from the books of the company, and that Oglesby had also purchased some of his stock at the succession sale of Perkins, and that the records of the company did not show that Perkins had ever paid for his stock.

The objections to this evidence, as stated in the Bill of Exceptions, are:

1. It is not the best evidence of the fact sought to be proved.

2. Plaintiff was estopped by the allegations in his petition to deny the ownership of Oglesby.

3. The evidence was immaterial.

If the last objection be good, then the evidence did not influence the verdict, and the defendants have not been injured thereby.

The first objection cannot be sustained, because the *non-payment* of the subscription is a fact to be proved by witnesses; the books of the company are not the *best* evidence in the proper sense of that term; whether the records of the company did or did not show payments, is merely a circumstance of no special value unaided by oral testimony.

I cannot see how Attrill, who purchased from Oglesby, on the representation that he was owner of the stock, is estopped, when sued for the value of the stock, to show that Oglesby deceived him.

5. The ground of objection to the instruction given at p. 36, is not stated; the instruction contains several propositions; if any one is correct, the exception falls.

The court had already instructed the jury that if the acts constituting the fraud were done by the procurement of Attrill, in his interest and by his agents, in such case the fraud was practiced by Attrill, and he was responsible for whatever damages the defendants sustained, p. 32.

In the present instruction the court gave a general instruction, that if Attrill was the author of the frauds he was responsible; no modification of the term "author" was asked for, and no objection was made on the ground that the term might be misunderstood. The instruction is undoubtedly correct as it stands.

6. Bill of Exceptions, p. 33. The general question, "do you know whether the assessments were true or false?" evidently was intended to elicit a general answer, "yes" or "no." Such general answer necessarily involved the expression of an opinion deduced by the witness from facts either known or communicated to him. The Court was right, but if wrong it is manifest the ruling did no harm.

7. Bill of Exceptions, p. 46. The question propounded to the witness, Walker, was this: did "Attrill say anything to you "about the directory being under his management and control? "If so, what did he say? State all he said on the subject."

It appears from the bill that counsel for plaintiff objected to the question, and the Court sustained the objection. What the ground of objection was, is not mentioned. Such a bill will not be considered by this Court.

Campbell vs. Doremus, 3 How. 530.

The Court will presume the ruling was correct.

U. S. vs. Wilkinson, 12 How. 252.

8. The last Bill of Exceptions also has reference to the testimony of the witness, Walker.

The question propounded to the witness was, "what, if any "thing, was said to you by Thomas L. Wibray or F. J. Herron "or any other member of the said Board of Directors, as to the "object and purpose of the assessment of one and one-half per "cent. and two per cent., which were respectively levied in "April and May, 1873."

This was objected to on the ground that the matter inquired of was a privileged communication.

As appears by the previous Bill of Exceptions, p. 46, as well as this bill, p. 150, this question had no reference to Attrill, for Walker testified that Attrill had never spoken to him about the assessments.

It is evident, from the whole tenor of the Bill of Exceptions, that the purpose of the question was to elicit from Walker testimony as to conversations held by him with the members of the Board of Directors, to establish that the object and purpose of the assessments were fraudulent, and a part of a scheme for the perpetration of a fraud.

Walker testified that he was the attorney of the company from 1871 down to the act of consolidation in 1875; that he was originally employed by the Directory preceding the Wybray Board, and was continued by the Wybray Board as counsel of the company, and that he considered himself generally the attorney of the company.

Under these circumstances I consider conversations held by the members of the Board with the counsel of the company, as to a corporate act, privileged communications.

Respectfully submitted,

THOS. J. SEMMES,

Of Counsel for H. Y. Attrill, Defendant in Error.

JAMES H. MCKENNEY

Supreme Court of the United States

OCTOBER TERM, 1881.

No. 299.

JOS. H. OGLESBY and JULES CASSARD

vs.

HENRY Y. ATTRILL.

Supplemental Brief of Defendant in Error.

THOMAS J. SEMMES,

Of Counsel for Defendant in Error.

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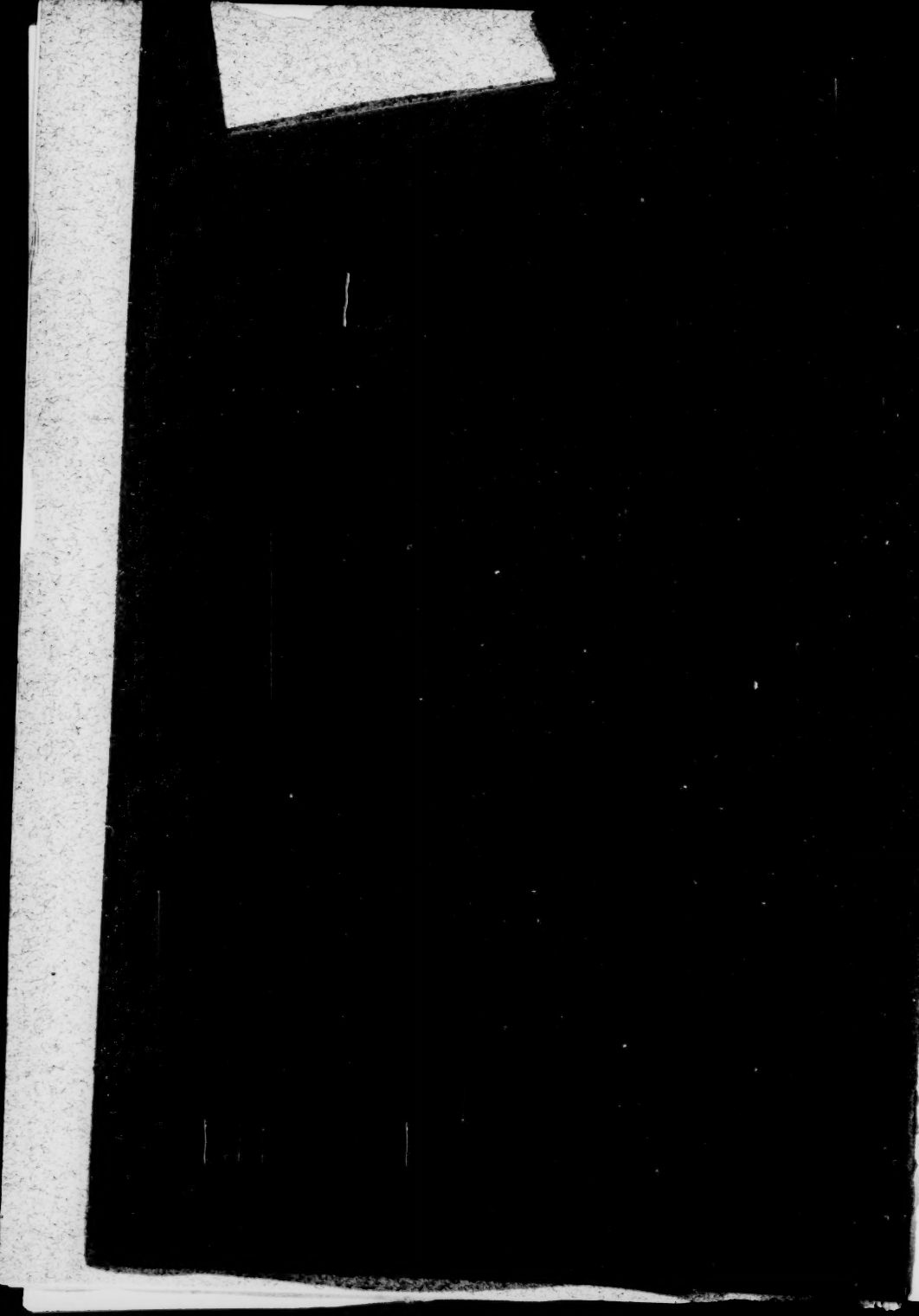

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SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

1. The counsel for plaintiff in error seems to rely on the case of Lallande *v.* Ball, 20 A., 194, to sustain his contention that the cause of action set forth in the reconventional demand arises *ex contractu*, and is not therefore subject to the prescription of one year.

In that case the plaintiff sued to recover the amount of a promissory note given by defendant as part of the price of a tract of land.

Defendant claimed in reconvention $10,000 damages, incurred by him in consequence of fraudulent misrepresentations of the plaintiff, his vendor, who led him to believe that the tract of land was partly composed of swamp lands, and that it was bounded by the Mississippi River, which representations were the inducement for the purchase of the land.

But supposing the swamp land in the vicinity was part

of the tract sold, which was not the case, the defendant erected a saw-mill, but it was valuless for the want of cypress timber, and being unable to erect cabins on the place to house his laborers, he lost a crop of 120 bales of cotton.

The court on motion struck out that portion of the reconventional demand which related to the loss of crops as too remote, and sustained the claim for damages suffered by the erection of the saw-mill to saw lumber from the swamp tract, which he was *informed was included in his purchase.*

The court held that the court below was correct in disregarding the plea of prescription of one year, "which does not apply to damages *ex contractu.*"

The cases cited by the court are 4 N. S., 335; 9 R., 396, and 11 A., 554, all of which were suits for damages resulting from violation of contracts of affreightment, or others of that nature.

The court will observe that the misrepresentations in the case of Lallande *v.* Ball referred to the object or subject matter of the contract—the adjacent swamp lands represented to be part of the tract sold, were not in fact included in the sale.

Our code provides for such cases in express terms:

Article 2547. "A declaration made by the seller that the thing sold possesses some quality which he knows it does not possess comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject under the title of '*conventional obligations.*' It may, according to circumstances, give rise to rehibition or to a reduction of the price and to damages in favor of the buyer."

Article 2520. "Rehibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice."

Article 2545. "The seller who knows the vice of the

thing he sells, and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

Article 1847. "Fraud as applied to *contracts* is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party or to cause an inconvenience or loss to the other. From which definition are drawn the following rules:

"1. Error is an essential part of the definition; an artifice that cannot deceive can have no effect in influencing the consent, and cannot injure the validity of the contract.

"2. The error must be on a material part of the contract, that is to say, such part as may reasonably be presumed to have influenced the party in making it, but it need not be the principal cause of the contract, as it must be in the case of simple error without artifice.

"3. A false assertion as to the value of that which is the object of the contract is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he who is induced to contract by means of the assertion might, with ordinary attention, have detected the falsehood; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other.

"4. But a false assertion of the value or cost or quality of the object will constitute such artifice if the object be one that requires particular skill or habit, or any difficult or inconvenient operation to discover the truth or falsity of the assertion. Sales of articles falsely asserted to be composed of precious metals, sales of merchandise by a false invoice, of any article by a false sample, of goods in packages or bales, which cannot without inconvenience be unpacked or inspected, or when the party making the sale avoids the inspection with intent to deceive, of goods at sea or at a distance, are, with others of a like nature, referable to this rule."

The residue of the article has no bearing on this case.

It is manifest that fraudulent representations as to the object of the contract or its quality, are with us regarded as

warranties at common law, and an action to recover damages in such cases arises *ex contractu*.

The case at bar is clearly distinguishable from that class of cases; it is a case of alleged fraudulent conspiracy to influence the conduct of the plaintiffs in error to their injury, whether to make a sale, or do any other act by which they sustained damage, is immaterial. The formation of such a conspiracy and the putting it into operation, and thereby causing damage of any kind to the plaintiffs in error, constitutes a violation of a general duty to society within the definition of the French authorities cited by Mr. Kelly in his brief, and such violation gives rise to an obligation *ex delicto* in favor of the determinate individuals who may have sustained loss, and against the determinate conspirators who caused the injury.

Second Point.

It is to be observed that the answer and reconventional demand contain no averment that the assessments were not genuine, or that they were *fictitious*. The burden of the complaint is that they were arbitrary, unnecessary, illegal; that they involved the payment of large sums of money, from which the plaintiffs in error had just reason to believe that neither of them would derive any benefit; that the payment of these exactions would have involved their utter ruin; that there was no serious design to build gas works or lay pipes with the money called for by the assessments, and that the directors had agreed among themselves not to pay the assessments on their stock; that the sole object of making the assessments was to induce the shareholders to give up their stock for a mere nominal price.

All this is said of the assessments levied by the board of directors for the purpose of showing "the motive" which induced them to make the levy; that the assessments were actual, and not fictitious, is admitted throughout; their *effect* alone being matter of complaint.

In the case of Penobscot R. R. Co. *v.* White, 41 Maine R., p. 512, it was held that in an action by a railroad company to recover assessments made for the general and legitimate purposes of the corporation, it is not necessary for the plaintiffs to show a compliance with the provision of its charter, requiring that the company shall not engage in nor commence the construction of any section or sections of the road, until seventy-five per cent. of the estimated cost thereof shall have been subscribed for by responsible persons.

And that the right to make such assessments cannot be made to depend upon any actual indebtedness existing at the time, nor can it be defeated by any apparent indebtedness incurred under an invalid contract.

The court say: "This provision" (referring to the clause respecting the estimated cost of construction above mentioned) "does not seem to have any connection with the organization of the company, nor to take from them the power of making assessments as conferred by their charter when deemed necessary, however much it ought to influence them in deciding upon the question of the expediency of making such assessments. It is undoubtedly true, as is contended by able counsel in defense, that the right to assess money on the corporators depends upon the right to use it when assessed and paid, but the right to use it may without doubt exist, notwithstanding there is no actual indebtedness on the part of the corporation existing at the time when the assessment is made. It may be, and often is, expedient to make assessments in view of anticipated liabilities to be subsequently incurred in the prosecution of the general purposes for which the corporation was created, but it may be questioned whether it would not generally be much wiser, and would not better promote the pecuniary interests of such corporations, to postpone the making of their contracts until a solvent treasury should insure the prompt performance of them on their part."

The court then proceeds to maintain that the subsequent misappropriation of the money by the corporation or its agents would not render the assessments void.

THIRD POINT.

It is to be observed that there is no allegation of any representation made to the plaintiffs in error to induce them to sell their stock—the *fact* which induced them to sell out was the levy *of the assessment*—and this is denounced as wanton, illegal, and unnecessary. If the levy of the assessment is to be regarded as a representation that money was needed for the purposes of the corporation, whether to build gas works or to carry on an expensive litigation, or any other purpose, it is at most a representation of a *future policy* and not of an existing fact.

If this be so, such representation, even though false, is not actionable.

"As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law. To warrant an action for a false and deceitful representation, it must assert a fact or facts as existing in the present time, or as having taken place."

Gage *v.* Lewis, 68 Ill., 604.
Gallagher *v.* Brunel, 6 Cow., 346.
Gray *v.* Palmer, 2 Rob., 500.

But, as I have said, there is no allegation whatever in the answer or demand in reconvention, that any representation was made to the plaintiffs in error by Attrill, or any one else, to induce them to part with their stock. The motives which operated on their minds, and which influenced their conduct, were that the alleged illegal, arbitrary, and unnecessary exactions of the company by means of the assessments would involve them in utter ruin; that is to say, they had subscribed for more stock than they could afford

to take; that when they subscribed they never expected to pay for the shares taken by them; and that their purpose was to manipulate the city authorities of New Orleans, and through them obtain at a sacrifice the works of the old company, whose charter was about to expire.

FOURTH POINT.

It is manifest that the plaintiffs in error could not have resisted an action at law for the enforcement of the assessment levied by the board of directors, on any of the grounds mentioned in the reconventional demand.

The subscriber for shares of stock in a corporation is liable for unpaid assessments without any express promise to pay them.

Upton *v.* Tribilcock, 91 U. S., 45.

So is a transferee of stock after he has been accepted by the company.

Webster *v.* Upton, 91 U. S., 65.

The question whether the exigencies of the company require the payment of calls, is not one to be raised in a defense to a suit for their recovery.

Judah *v.* Live Stock Ins. Co., 4 Ind., 33.
5 Gray, 586; 22 Conn., 435.

Nor will a court of equity interpose to restrain the company from making calls, nor will it inquire into the necessity or propriety of making a call.

Kerr on Injunctions, 497–8.
Logan *v.* Courtown, 5 Eng. Law and Eq., 171.
R. R. Co. *v.* Cross, 20 Ark., 452.
Baily *v.* Birkenhead R. R. Co., 12 Beav., 433.

The last named case resembles this in some particulars.

The bill alleged that one B. and certain other directors had formed a scheme, to conduct the affairs of the company without regard to the general benefit of the stock-

holders, but for the benefit of one class of stockholders to the injury of another; that they had taken measures to obtain a majority of the board, to depreciate the value of a certain class of stock, by a levy of an unnecessary assessment of £10 per share to frighten the holders thereof with a view to obtaining their consent to certain disadvantageous terms.

Lord Langdale in his opinion sustaining the demurrer says at page 440:

"It appears to me that this bill can only be considered as an attempt to induce this court to interfere in the internal management of the affairs of the company, and to take upon itself to determine a question which might arise and ought to be determined by the stockholders themselves at general meetings. *The only foundation for relief in this court is the allegations that the calls in the circumstances which have happened are not wanted, and that the plaintiff and other shareholders of the class to which he belongs are or are likely to be defrauded by a scheme formed by the other shareholders seeking in some way to benefit themselves or the other classes of shareholders to the prejudice of the plaintiff, and those for whom he sues, and proceeding to enforce calls in pursuance of such alleged fraudulent scheme.*"

And at page 442:

"It is indeed alleged that *there is an intention to abandon* a part of the work, for the completion of which the powers were granted to the company. This may be quite unauthorized, but it is not sufficient to show that the enforcement of the call may not be necessary for lawful purposes."

The alleged understanding among the directors and others as to non-payment on their part, would not have availed them in a suit brought against them by the plaintiffs in error, suing on behalf of themselves and all other stockholders similarly situated.

Macon R. R. Co. *v.* Vason, 57 Georgia, 316.
Dorman *v.* Jacksonville R., 7 Fla., 281.
Little *v.* O'Brien, 9 Mass., 423.
Preston *v.* Collier Co., 11 Simons, 327.
Chandler *v.* Brown, 77 Ia., 337.
Melvin *v.* Lanor Ins. Co., 80 Ill., 461.

If this be law, on what ground can the plaintiffs in error base their claim for damages? If payment of the assessment could not have been resisted, it is because the levy of it was a lawful act. That being conceded, the motive or intention which influenced those who performed the act cannot make it actionable.

See cases cited in original brief, p. 18.

FIFTH POINT.

There is no allegation that the plaintiffs in error ever sought to be reinstated in their stock. They were fully aware in 1873 of all the facts on which they now rely for success, except the agency of Phipps, and the alleged motive which actuated the board of directors in making the assessment. There is no allegation as to any inquiry made by them to obtain information. Under these circumstances, combined with the allegation in their petition for injunction filed in 1873 as to "the frauds and machinations of the officers of the company," manifesting knowledge at that time, I submit the plaintiffs in error have acquiesced in and thereby condoned the alleged injury.

They sold their stock in May, 1873. Since then circumstances have changed.

1. The New Orleans Gas Co. had the exclusive right until the expiration of its charter. It was not till after plaintiffs in error sold their stock that the act passed, July 10, 1873, declared that the charter of the New Orleans Gas Light Co. expired 1st April, 1875. It is clear from this act that at the time plaintiffs in error sold, the rights of the Crescent Company were not defined, and its charter of doubtful construction.

Subsequently, on 12th December, 1874, the chartered rights of the Crescent City Company were enlarged by the passage of an act authorizing the consolidation of companies, and made possible the consolidation which took place on 10th April, 1875. But for the consolidation large

assessments would have been necessary to carry into effect the objects of the Crescent City charter.

The plaintiffs in error escaped all responsibility for assessments by the surrender of their stock under the compromise; allowed Attrill and his associates to incur the expense and hazard of litigation, and after reimbursement to them of their petty subscription of fifty cents per share, they now appeal to the courts for a divide in the results of a speculation they had abandoned as too dangerous for prudent men to invest their funds in.

In Morgan *v.* R. R. Co., 2 W ds, 250, Mr. Justice Bradley says: "Acquiescence for a little time is condonation."

See also Samuel *v.* Holliday, 1 Woolworth C. C. R., 410, and 6 Allen, 52, and 3 Rhode Island, 9, therein referred to.

Respectfully submitted,

THOMAS J. SEMMES,
of Counsel for Defendant in Error.

NOTE.—A case similar to this, and arising out of the same transaction—Grant *v.* Attrill—was decided a few weeks ago by the Circuit Court of the United States for the Southern District of New York, Judge Wheeler presiding. He sustained a demurrer to a bill containing averments stronger than those contained in the reconventional demand, and in which no reference to the compromise was made.

JAMES H. MCKENNEY, CLK.

Supreme Court of the U. S.

October Term, 1881.

No. 299.

OGLESBY & CASSARD, PLAINTIFFS IN ERROR,

vs.

H. Y. ATTRILL, DEFENDANT IN ERROR.

Additional Notes, by S. T. Wallis, of Counsel for Defendant in Error.

Murphy & Co. Printers & Stationers, 182 Baltimore street, Baltimore

Supreme Court of the United States.

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ADDITIONAL NOTES ON BEHALF OF DEFENDANT IN ERROR.

1. AS TO THE CHARACTER OF THE PROCEEDING, IN RELATION TO THE QUESTION OF PRESCRIPTION.

The Supreme Court of Louisiana, in the case of Wartelle vs. King, 10 La. An., p. 656, having in terms described the class of cases to which the prescription of one year applies, as "actions sounding in damages for torts," there would seem to be hardly room for discussion as to whether the present proceeding comes within the class described. It is, in all its characteristics and aspects, identical with a common law action on the case for damages, for fraud and deceit of the defendant, whereby the plaintiff was misled to his injury. Conspiracy is alleged as well as fraud. The

plaintiffs in error charge that they were "illegally deprived" of their stock (Rec., p. 10); that it was "illegally obtained" from them; that "they have been illegally and cunningly deprived of it by said Attrill" (Rec., p. 13); that the other parties implicated were "the aiders, abettors and confederates of the said Attrill in his illegal proceedings." They claim to have been forced into the compromise, under which they parted with their stock, by threats and by fraudulent and illegal contrivances (Rec., p. 12). They charge a fraudulent use of "the process of the Courts to compel each of them to sacrifice his rights or to submit to the illegal, arbitrary and unnecessary exaction of the plaintiff (Attrill) and the directors, all of which would have involved their utter ruin" (Rec., p. 12). These allegations define and characterize their cause of action. That these are averments in contract; that the damage alleged is claimed as for a breach of contract; that the action, in any sense—even the widest and remotest—can be said to "sound in contract"—would seem to be propositions as untenable as if they were urged in regard to an action for damages, founded on duress by violence. The tortious act—the injury—is just as much the real and substantial cause of action in the one case as the other, and it is equally a departure from all sound principle to say, that when a man sues for damage, done him by forcing or cheating him into a contract which he repudiates, he is suing on the contract, or claiming through it. "Duress," says Judge Cooley, "is a species of fraud, in which compulsion, in some form, takes the place of deception in accomplishing the injury."

Cooley on Torts, 506.

That case is, at common law, "the remedy for fraudulent deceit and misrepresentation" is rudimental.

Browne on Actions at Law, 383 (45 Law Libr., 274).

McAleer vs. Horsey, 35 Maryland, 459.

And even in the limited class of cases where the party injured by fraud may sue in assumpsit or in tort, at his election, Chitty advises tort, on the ground that "in cases of fraud the statute of limitations *may* not begin to run till the fraud is discovered, and

therefore it would be sometimes advisable to sue for the fraud and waive the action of assumpsit."

1 Chitty's Plead., 240.

This very advantage of an action of tort is claimed in the present proceedings, and yet the contention is that this "is not a claim for damages *ex delicto*." (Brief of Plffs. in Error, p. 29.)

What are "torts" this Honorable Court has itself defined—in deciding as to the meaning of the word in Admiralty—as follows:

"Nor is the definition of the word 'torts' when used in reference to admiralty jurisdiction confined to wrongs or injuries, by direct force. It includes also *wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy, at common law, is by an action on the case.*"

Philad. R. R. vs. Philad. Steam Towboat Co., 23 How., 215.

And that where the proceeding is in tort, the fraud, and not the contract induced by it, is the cause of action, is demonstrated by the fact, that an action for damages by deceit may be brought, in a large class of cases, by a plaintiff who was not a party to the contract, but was still injured by the fraud.

Kerr on Fraud (Bump's Edit.), 373, and cases in note.

Benjamin on Sales (2d Am. Edit. by Perkins), sects. 431, 432.

In like manner, where the fraud of a third party induced the contract, the party defrauded has his action for deceit against such third party, though the contract, as between the parties contracting, may be unaffected by the misrepresentation.

Kerr on Fraud (Bump's Edit.), 331.

The mistake of the argument on the part of the plaintiffs in error, it is respectfully submitted, arises out of a neglect of the distinction between a misrepresentation or fraudulent statement, pending a contract of sale, in respect to the thing sold, and an independent fraudulent statement or act which may induce a contract of any sort. The former class of misrepresentation may, in some cases, become a part of the contract, by estoppel,

or may be construed into a warranty and thus be brought within the scope of remedies founded on the contract. This was clearly the *ratio decidendi*, in the case of Lalland vs. Ball, 20 La. An. Rep., 194, relied on by the learned counsel of the plaintiffs in error (Brief, p. 29), and the same will be found to have been the governing principle in all the cases cited, which are supposed to remove the case at bar from the classes to which the prescription of one year applies. The three cases relied on in Lalland vs. Ball (Jordan vs. White, 3 N. S., 335; Palmer vs. Smith, 3 Rob., 392, and McGoffin vs. Cowan, 11 La. An., 554) were all cases of plain contract—two of them actions against factors, for negligent discharge of duty, as such—the third a case where the negligence of a pilot in his duty was set up in reconvention (or rather in compensation, or recoupment) against his demand for wages. The various cases cited, where prescription of one year was refused, in proceedings to make the directors of corporations account for losses by their official fraud or negligence, were all placed (as will be seen by referring to them) expressly on the ground of the contractual obligations of the defendants as mandataries.

It need hardly be said, that there is no color for the analogy endeavored to be set up, between these last cases and the one at bar, as Attrill is not charged as a mandatary or as having any official relation to the corporation. That one stockholder, as such, occupies a contractual or fiduciary relation to another stockholder, or that any such relation is created by the fact that the directors of the corporation are their common mandataries, as is intimated in the brief of Mr. Kelly (p. 30), will hardly be urged. No case of the many that are cited, will be found, it is confidently believed, to maintain the proposition that a proceeding like the one at bar, is or can be other than an action *ex delicto*. And it does not affect the question, to say, as is suggested in the brief of the plaintiffs in error, (foot of p. 29,) that the reconventional demand, here, is for the value of the property and not for damages *ex delicto*. The stock in controversy is expressly averred,

in the reconventional demand, to have "been rendered valueless to the said Oglesby & Cassard, in consequence of the fraudulent acts of the said H. Y. Attrill," (Rec. p. 10,) and it is further charged that he "has converted the stock, &c., to his own use," (p. 13). For these injuries, the only redress can be damages, and they are damages none the less, because of their being measured by the value of the stock converted.

2. As to the Cause of Action Disclosed by the Demand in Reconvention.

In the brief of Mr. Kelly, it is urged (p. 20) that the decision of Mr. Justice Woods, on the Circuit, in the case of Kilgore vs. The N. O. Gas Light Co., (2 Woods, 145,) substantially affirms the legal sufficiency of the cause of action here set up in reconvention. It is respectfully submitted that the cases are altogether different. In that case, the complainant averred that his stock had been fraudulently forfeited. In the present case, the plaintiffs in error admit in their answer (Rec. p. 9), that they sold out their stock under a compromise, and their contention is, substantially, to have that compromise collaterally treated as a nullity, without taking any specific proceeding to annul it. In Kilgore's case it was further charged that Attrill was President of the Crescent City Company, and as such defrauded the complainant. The prayer of the bill was to have complainant's stock, or an equivalent amount in the New Orleans Gas Light Company, set aside to him.

The Court, in delivering its brief opinion on the demurrer and sustaining the jurisdiction in equity, said:

"It is clear there is no adequate remedy at law. *A money judgment against Attrill, for his fraudulent conversion of the stock of complainant, is not the relief he wants.*"

The words italicized define precisely what the present action seeks and what it is.

In analyzing the case made by the demand in reconvention, it will be seen that it really does not rest at all on the theory of misrepresentation. If there was any fraud in the assessment complained of, such fraud consisted in levying the assessment for fraudulent purposes and not in representing that the purposes of the levy were lawful. The wrong, if any, was done by the assessment itself and not by any declarations in regard to it, and accordingly, while the pleadings of the plaintiffs in error aver that the latter made every possible remonstrance against the assessments, as wanton and lawless, they charge no declarations or representations of any sort to have been made, by the directors, in reply or otherwise, but only aver that "they were inexorable, and insisted upon carrying out their plan," and that they brought suits for the assessments in furtherance of it. (Rec., pp. 9, 12.) The institution of these suits is then charged (Rec., p. 12) to have been an abuse of legal process, in order to "compel" the plaintiffs in error to sacrifice their rights or submit to illegal exactions.

Thus far then there is no misrepresentation alleged. The charge is of illegal acts only.

The suits for the assessments were brought on May 14th, 1873. (Rec., p. 3.) Prior to that, on March 6th, 1873, (a month after the assessments were levied,) the plaintiffs in error, with others, had filed a proceeding to enjoin the directors from enforcing the payment of the assessment, and it was pending these two cross-proceedings that the compromise was made, under which all the suits were dismissed (Rec., pp. 3, 4, 9, 12) and the plaintiffs in error sold out their stock, for what they had paid for it, and were relieved from past and future assessments. There is no averment that this compromise was made under the influence of any false statements or representations on the part of Attrill or the directors. The allegation, on page 13 of the Record, that the plaintiffs in error were "misled" by Attrill's reiterated assertions "that he *had* bought the aforesaid stock in the market fairly and in good faith," can of course only apply to assertions alleged to have been

made after Attrill had become the owner of the stock of plaintiffs in error, and not before they parted with it.

The compromise, therefore, is charged to have been made—not in consequence of misrepresentations, but under the alleged compulsion of an illegal assessment and an abuse of process to enforce it. There is, undoubtedly, the further averment of threats, made by the directors, to repeat the assessment (Rec., p. 12) until the entire stock should be paid up—but this was threat, not misrepresentation. It was, if truly charged, only a menace of future oppression—of fraud contingently contemplated. It savored of duress, if of anything actionable, but it was of course not duress.

Cooley on Torts, 506.

Indeed the first specific averment under which the compromise is sought to be treated as a nullity, in this collateral way, is, that it was made "in error of the facts" (Rec., pp. 9 and 12)—not from any misrepresentation of the facts. And what was the alleged "error?" It was that they did not know, at the time, that Phipps, to whom they sold their stock, "was an agent of Attrill to combine with the other directors as hereinbefore charged." But for this error of fact they aver that "they would have defended the suits brought against them and would not have surrendered their stock" (Rec., pp. 12 and 13). They then further charge that Attrill and the directors "concealed from them the object and design of said assessments" (Rec., p. 13). Error in fact then, and concealment—not misrepresentation—are the two grounds on which the compromise is sought to be avoided and the reconventional demand substantially rests.

In the answer of the plaintiffs in error the alleged "error of fact" is more broadly and, at the same time, more precisely stated than in the reconventional demand itself. It is charged (Rec., foot of p. 9) to have consisted:

1st. In ignorance of the fact that Phipps, to whom plaintiffs in error allege that they transferred their stock, was an agent of Attrill's to combine with the other directors to compel the stockholders to sacrifice their stock; and

2d. In ignorance of the existence of such combination or conspiracy itself.

The reduction of the alleged causes of nullity in the compromise to these two grounds—so far as error in fact is concerned--simplifies very much our enquiry as to whether any legal cause of action is disclosed by the reconventional demand. Let us see how far the two errors of fact alleged are consistent with the rest of the case set up.

In the first place, it will be observed that the second specification of error in fact obviously includes the first. Ignorance of the fact that a conspiracy exists involves, of necessity, ignorance as to the parties engaged in it. But how could ignorance of Phipps' alleged relation to Attrill in any event affect the question? The alleged wrong consisted in forcing or inducing the plaintiffs in error to sell their stock, under the compromise. It did not consist in forcing or inducing them to sell it to any one person rather than another. Their parting with their stock, at the price they had paid for it, caused the alleged injury to them, and not their parting with it to Phipps. And this is demonstrated by the fact set forth in the Petition of Attrill and admitted (see Rec., pp. 3, 9, 12) that the name of the person whom the company accepted in place of the plaintiffs in error, as their substitute in their responsibility for past and future assessments, was left blank, such acceptance in blank being written, as part of the terms of compromise, across the very face of the transfers of the stock. This fact, which is part of the case made, demonstrates that the personality of Phipps was no element in the compromise, but that on the contrary, the substitution of some one else for Phipps, as purchaser, was within the express purview of the settlement, and that the filling of the blanks was left to him and the company, the plaintiffs in error having no concern with it. In fact, it is admitted, in the brief of Messrs. De Gray, Singleton & Browne, page 1, that the stock itself, sold to Phipps, was transferred in blank. See also page 19 of the same brief, and page 41, where it is insisted, in terms, (and in singular contradiction of the charge that Phipps was

fraudulently put forward, as purchaser, by Attrill,) that plaintiffs in error were not even "permitted to know who the purchaser of their stock was." They simply sold, without caring to whom.

In respect to the alleged ignorance of the supposed combination or conspiracy, at the time of the compromise, what does the case made disclose?

After the suits had been brought by the company to compel payment of the assessments, and a fortnight or thereabouts before the compromise, the plaintiffs in error, as already stated, had united with certain other stockholders, in a proceeding to enjoin the board of directors from enforcing the payment of the assessment. This proceeding was founded, in terms, upon an allegation of "frauds and machinations of the officers of said company." It could have been put on no other ground, for there is no suggestion that the call was *ultra vires* of the corporation or the officers, or illegal, otherwise than because of its alleged fraudulent purposes. Mere mistake of judgment, without any breach of trust, would have been no cause for interference to restrain.

Dodge vs. Wolsey, 18 Howard, 343.

Samuel vs. Holladay, 1 Woolworth, 419, 420.

2 High on Injunctions, sec. 1186.

Any averment of fraud in such cases must be specific and sworn to and general averments will not avail.

2 High on Injunctions, 1184.

Now there is no averment or suggestion, in this cause, that there were ever any other "frauds or machinations" of the directors than those which are set up in the reconventional demand. The averment, on the contrary, is that these identical frauds and machinations—none others being suggested—were at work, when the compromise was made, and before, but were not then known to the plaintiffs in error. If they were not then so known, what else, in the way of fraud, could the plaintiffs in error have known, as the foundation of their injunction proceeding? If there was nothing else to allege as ground for injunction, what else can be held to have been the meaning of the allegations in the proceeding

to enjoin? It is not permitted to the plaintiffs in error to say that when they charged fraud, and necessarily under oath, they had no particular grounds or facts of fraud in their contemplation. Such being the law, and they being estopped from pretending that they made false and groundless clamor, the alternative conclusion seems inevitable, that their averments of fraud, then made, were founded on the only and identical fraud which they allege to have preceded and controlled the compromise, but of which they now aver that they were then in ignorance. And this construction of the case set up in reconvention is not only the necessary construction, and the only one legally to be arrived at from the face of the demand, but is demonstrated, by another part of the pleadings, to be the true one. Two years after the compromise, and only two days before the filing of Attrill's petition in these proceedings, but several months after the date at which the plaintiffs in error aver that they became fully aware of the existence of the antecedent frauds charged, they gave to the President of the New Orleans Gas Light Company (Rec., p. 2) the notice which caused the present litigation. In it they ground their right to be still regarded as stockholders of the Crescent City Gas Light Company on the fact, stated in these words—"that we were defrauded of said stock *by the fraud and machinations of the officers of the said company*"—being the identical words used in their injunction bill, two years before, as to the frauds then and there set up. If any new or other frauds than those existing at the time of the compromise were now set up, or were claimed to have existed before or since, it might possibly be argued that the same words were intended to describe different things, but as the frauds now and the frauds then are confessedly the same, how is it possible to escape the conclusion, that the same words meant the same thing, in both cases, and that the frauds set up then were the frauds set up now? And this is in no way appealing to the facts, to affect a question of law on demurrer. It is simply collecting the true and real case of the plaintiffs in error from the pleadings, taken as a

whole, and getting at its legal effect, as a whole, by a collation instead of a segregation of the averments.

What has been said, as to the "error of fact," applies, with equal force, to the alleged "concealment," down to the time of the compromise. If the "frauds and machinations" of the officers of the company were known to the plaintiffs in error, when they swore to their existence, for the purposes of an injunction, in 1873, the concealment had plainly been very ineffective in misleading them. Indeed, as no active concealment, by artifice or misrepresentation, is averred, but only concealment by silence, the averment in this regard is practically and substantially the same as that of "error of fact," or ignorance. The difference is entirely one of phraseology, by which the same alleged fraud is made to do duty as several frauds. That there was in fact no injury done to the plaintiffs in error, by the concealment, any more than by the error of fact alleged, is believed to be conclusively shown, by the admissions which the very averments of the answer and demand involve and make. The plaintiffs in error specifically charge in their answer, (Rec., p. 9) and repeat in their reconventional demand (Rec., p. 12) that "the assessments were unnecessary;" that it "did not fall within the province of the directors to make them, under the circumstances in which they were placed;" that the directors "had made no arrangements to purchase property or to build gas works or to lay pipes, and had no serious design of doing either." Of these facts there is not the slightest pretence or averment that the plaintiffs were ignorant, when they sold out their stock under the compromise. On the contrary, they aver, in terms, that they remonstrated in vain against the making of the assessment under those very circumstances, and that they finally sold out their stock and took a release from assessments past and present, on the express ground, that "they had just reason to believe that if they paid the assessments they would never derive any benefit therefrom" (Rec., pp. 9 and 12).

In the face of these admissions—or, to speak more properly, these emphatic affirmative allegations—it seems difficult to under-

stand, how the case put can be treated as one in which the plaintiffs compromised in ignorance of their rights, or were misled by their confidence in the directors or in Attrill, or were influenced by the silence of any one, or their own ignorance of essential facts. They confess to have had a knowledge of facts which rendered the assessments illegal and fraudulent, and they aver that they compromised, because they had just reason to believe that to retain their stock, under such circumstances, would be ruinous. What they thus confess that they knew then and had reason to believe would happen afterwards, could only have been true upon the theory of fraud and combination existing and contemplated. Fully informed of all this, and with the fullest knowledge, besides, that if money was not needed at that moment, it must, of necessity, be needed soon and obtained from the stock-holders, unless the corporation intended to abandon its position and franchises, they deliberately preferred to get back what they had paid, and obtain a guaranty against further outlay, rather than go on with the pending litigation and take the risk of future assessments. It may or may not have been unwise for them to do this, as things happened to turn out, but that they did it advisedly, and with their eyes open, is too patent, it is respectfully submitted, for controversy, on their own showing.

It is suggested, however, in the brief of Messrs. De Gray, Singleton and Browne (p. 20) that there was in reality no compromise; that the only thing susceptible of compromise was the assessment, which remained undisturbed; and that even if there was a compromise, it was not between the parties to this suit and cannot be set up by Attrill here.

Upon the first point, it is perhaps sufficient to say that it is part of the very case of the plaintiffs in error, explicitly averred, (Rec., pp. 9 and 12), that they did "make the compromise set forth in the petition" of Attrill, and that they were compelled to make it, to prevent their ruin. But it is manifest, without this, that the plaintiffs in error had no interest in the question of the assessment, except in so far as they were called upon to pay it, and that if they

got rid of that obligation by compromise, and had the suits dismissed which had been brought against them to recover the assessment, the compromise disposed of the assessment, so far as they were concerned, and it was not of the slightest importance to them whether it was or was not enforced as to other stockholders.

As to whether the compromise can be effectively set up here by Attrill, there might perhaps be greater room for discussion (apart from the conclusive presentation of the question in the brief of Mr. Semmes—pp. 13 to 18) if the case was one of a settlement which was conceded to be valid, as between the parties, by reason of good faith in both, but into making which the person complaining alleged that he was misled, by the fraud of a third and outside party. This would be the case put in Kerr on Fraud, p. 331, cited above. But here, the compromise itself is impeached, by reason of the alleged fraud of the actual parties thereto. The plaintiffs in error complain here that they "were defrauded of said stock by the frauds and machinations of the officers of said company," and they made the same averment in their injunction proceeding, which was dismissed, as part of the compromise. Instead of Attrill being an outside party, they allege that he was really the author of the fraud imputed; that the directors were his tools and creatures; that Phipps, who negotiated the purchase of their stock, was his agent and creature also; that, in fact and substance, the whole transaction which resulted in and forced and embraced the compromise was Attrill's work, for his sole benefit. There is no averment that Attrill personally made any representations, or committed any other fraud than the identical one imputed to him through the overt acts of his agents and representatives. This identity between Attrill and his alleged agents and tools is relied on by the plaintiffs in error as the basis for one of the instructions which they asked from the Court, as to the measure of damages, and the refusal of which is assigned by them as error (Assignment IV, p. 9, of the brief of Messrs. De Gray, Singleton & Browne). In fact the identity referred to is the gist of the reconventional demand. It can hardly then be maintained, that Attrill was, in

exception states that Herron knew the fact of Oglesby's not having paid his own subscription, "from having frequently examined the books of said company." How he knew what he testified to in regard to the Perkins stock is not stated. The exception does not state that the books of the company were not produced or tendered. It simply sets forth that no evidence was produced tending to show their loss or destruction. Whether the exception, in this form, raises the point which it was probably intended to raise, is a question respectfully submitted, without discussion, to the Court.

The objections taken were to the entire deposition and statement of the witness, and were:

1st. That it was "not the best evidence of the fact it sought to prove."

2d. That Attrill was estopped to deny Oglesby's ownership of the stock, by reason of his having claimed, in his petition, that he was himself the owner of it, through Phipps' purchase from Oglesby.

3d. That the evidence was immaterial.

All of these objections are sufficiently disposed of by the brief of Mr. Semmes. The third, indeed, if well taken, disposes of itself and of the exception.

The second is founded on the erroneous assumption that there is a conflict of fact (sufficient to raise an estoppel) between Attrill's claim to own the stock, and the proof that Oglesby never paid for it. The company had issued certificates to Oglesby and these were assigned, and the stock was transferred to Attrill, for value, which Oglesby received. Beyond all doubt the assignment and transfer (which are not sought to be rescinded) passed Oglesby's title—whatever it was—to Attrill. Whether the company's certificate and the transfer of the stock, on its books, did or did not preclude it from setting up, as against Attrill, the fact that the stock had never been paid for, was a question entirely between Attrill and the company, if it was any question at all. Oglesby, certainly, could not set up his own default against any one, and it would be very singular if in an action instituted by him, against Attrill, to recover, in damages, what the stock was worth to him, Attrill was

estopped from showing that he (Oglesby) had never paid anything for it. Unless the face of the certificate showed (which does not appear) that the stock was paid up, to the amount of the prescribed instalment, Attrill took it *cum onere* and was liable, *prima facie*, to the company, for the total subscription unpaid. But, whatever may have been Attrill's liability, Oglesby at all events was estopped from disputing his title, and it can hardly be maintained, as a proposition of law, that a man is precluded from showing that his vendor had never paid for the thing sold, by reason of the fact that he bought and claims whatever title the vendor could transfer.

As to the other objection, that the proof offered was not the best evidence of "the fact" sought to be proved—assuming for the argument that there was only one fact offered in proof, and not two distinct facts, as has been shown—the ruling of the Court in Evanston vs. Green (99 U. S., 660, 665) seems conclusive. The evidence was objectionable, if at all, by reason of its being *res inter alios*, and not because of its being of an inferior degree. The books of the company, if produced, would not have been any better evidence against Oglesby than Herron's statement of what they contained. By not taking the true objection, but specifying another, the plaintiffs in error must be held, under the decision last cited, to have waived it, and they cannot now rely on it. See also Wilson vs. McNamee, 102 U. S., 574.

But, after all, the admission of the proof objected to, even if erroneous, could have done no harm to the plaintiffs in error. Cassard, of course, it could not have injured, because it did not refer to him. The objection to it, nevertheless, was made on his behalf as well as Oglesby's, and the exception is taken in their joint names, which, by the way, ought, of itself, to be fatal to both objection and exception. But, apart from this, the evidence, so far as Oglesby was concerned, went only to the amount of his damages and not to his right to recover. As the jury pronounced against his right to recover, the proof could not have affected the verdict. This is shown as matter of fact, quite as effectually as in point of law, by the consideration, that the jury found the same verdict against Cassard, in relation to whom the proof was not ten-

exception states that Herron knew the fact of Oglesby's not having paid his own subscription, "from having frequently examined the books of said company." How he knew what he testified to in regard to the Perkins stock is not stated. The exception does not state that the books of the company were not produced or tendered. It simply sets forth that no evidence was produced tending to show their loss or destruction. Whether the exception, in this form, raises the point which it was probably intended to raise, is a question respectfully submitted, without discussion, to the Court.

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But, after all, the admission of the proof objected to, even if erroneous, could have done no harm to the plaintiffs in error. Cassard, of course, it could not have injured, because it did not refer to him. The objection to it, nevertheless, was made on his behalf as well as Oglesby's, and the exception is taken in their joint names, which, by the way, ought, of itself, to be fatal to both objection and exception. But, apart from this, the evidence, so far as Oglesby was concerned, went only to the amount of his damages and not to his right to recover. As the jury pronounced against his right to recover, the proof could not have affected the verdict. This is shown as matter of fact, quite as effectually as in point of law, by the consideration, that the jury found the same verdict against Cassard, in relation to whom the proof was not ten-

dered, as against Oglesby, who alone could have been affected by it. In this state of case, there is no ground for reversal, under the established rule of this Court, even if it should be held that the evidence ought to have been excluded.

Mining Co. vs. Taylor, 100 U. S., 37, 42.
Decatur Bank vs. St. Louis Bank, 21 Wall., 294, 301.
Brobst vs. Brock, 10 Wallace, 519, 528.

4. As to the 12th Assignment of Error.

The 12th Error assigned (Brief of plaintiffs in error, p. 15, Rec., pp. 49, 50) was the refusal of the Court to allow Mr. Alexander Walker, a witness for the plaintiffs in error, to be asked whether anything had ever been said to him, by Herron or Wibray, or any of the members of the board of directors, as to the object and purpose of the assessments complained of. Witness had testified (Rec., p. 48) that "his relations with Wibray and Attrill and the other gentlemen were entirely professional relations, for which they compensated him": that he never had any conversation with Attrill as to the matters enquired of (Rec., pp. 49, 50): that his fees were generally paid by Wibray and Herron: that "he considered himself generally the counsel of the company," &c., &c., though he was not consulted as to the assessments. Counsel for defendant in error thereupon objected to the question asked, on the ground that the matter enquired of was a privileged communication, and the Court sustained the objection.

It is not perceived that the force of the objection is affected by the consideration suggested in the brief of our learned opponents, viz: that Walker had not been consulted as counsel in respect to the assessments referred to. The real question is, as to the capacity in which he was spoken to, in regard to them. Conversations with and statements to counsel, as such, are quite as much privileged, when they refer to steps already taken, as when these steps are only in contemplation. It is the relation and the confidence growing out of it, during its continuance, which are the founda-

tions of the privilege, and are to be dealt with, not narrowly or restrictively, but in obedience to a wise and liberal policy.

Conn. Mut. Ins. Co. vs. Schaefer, 94 U. S., 458.

1 Wharton on Evidence, sects. 576, 577.

Weeks on Attorneys, 260.

It is argued, however, (Brief of plaintiffs in error, p. 43) that as the relation between the officers and the stockholders of a corporation is that of *cestuys que trust* and trustees, the counsel of the former are in law the counsel of the latter also, and there is no privilege in a case between the two. This, with submission, is believed to be a *non sequitur*. The officers are, undoubtedly, the trustees of the stockholders, but not of every separate stockholder. They are bound to make certain disclosures to any stockholder who enquires, but they are not bound to disclose their general purpose or policy or conduct except to the body of the stockholders, or on their request, or as required by their charter, or by-laws, or by general statute. They are not bound to inform every stockholder as to the matters concerning which they take professional advice or converse with counsel, nor is their counsel bound or entitled to answer the enquiry of every stockholder, as to what passes between him and the officers. There are certain analogies, of course, between stockholders and partners, and between the obligations of corporate officers and those of trustees, but corporations are nevertheless not partnerships, nor are they ordinary trusts. Their line of divergence is as well recognized as their points of analogy. If every man who held one share in a corporation had the right to know all that passed between the directors and the corporation counsel, a new element would certainly be added to the many, of which there are already enough, in stock speculation.

But, even if the question under discussion were not obnoxious to the objection taken below, it is obviously open to another and very conclusive one. It could only have been asked, upon the theory that Attrill and the parties whose statements to Mr. Walker were enquired of were co-conspirators, or jointly engaged in the perpetration of the fraud alleged. Accordingly, on pages 47 and 48 of the Record, it will be seen that evidence tending to prove,

prima facie, the existence of such alleged conspiracy, was offered and made part of the bill of exceptions. Now it is too well established for dispute, that acts and declarations of conspirators are only admissible against co-conspirators when "made and done during the pendency of the criminal enterprise and in furtherance of its objects. If they took place at a subsequent period, and are therefore merely narratives of past occurrences they will be rejected."

1 Greenl. Evid., Sect. III.

Lincoln vs. Claflin, 7 Wall., 138-9.

The enquiry here was general and indefinite, and unlimited as to time. It might have been answered by proof of declarations made a year after the consummation of the frauds alleged, or indeed at any time prior to the asking of the question. Being thus illegal and incompetent, the question was properly excluded, and there can be no reversal, even if the Court should differ with the Court below as to the sufficiency of the ground assigned for its exclusion. The plaintiffs in error "were not deprived of any right by the rejection of the evidence" and "it is not cause for reversing the judgment, that an erroneous reason was given for rejecting it."

Silsby vs. Foot, 14 Howard, 222.

It will be noted, in regard to the exception under discussion, as well as those embraced in the 11th and 12th Assignments of Error (pp. 14 and 15 of Brief of plaintiffs in error), that neither of them sets forth what the plaintiffs in error expected to prove, by the answers to the interrogatories which the Court refused to allow. The exceptions recite the questions propounded and nothing more, and would seem to be thus obnoxious to the rule laid down by the Court, in Packet Company vs. Clough (20 Wall., 542), viz: "A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict."

S. T. WALLIS,

Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

JOSEPH H. OGLESBY AND JULES CASSARD, PLAINTIFFS IN ERROR.

versus No. 299.

HENRY Y. ATTRILL.

APPENDIX TO BRIEFS FILED CONTAINING VARIOUS ACTS OF THE LEGISLATURE OF LOUISIANA, REFERRED TO IN THE PLEADINGS AND ARGUMENT.

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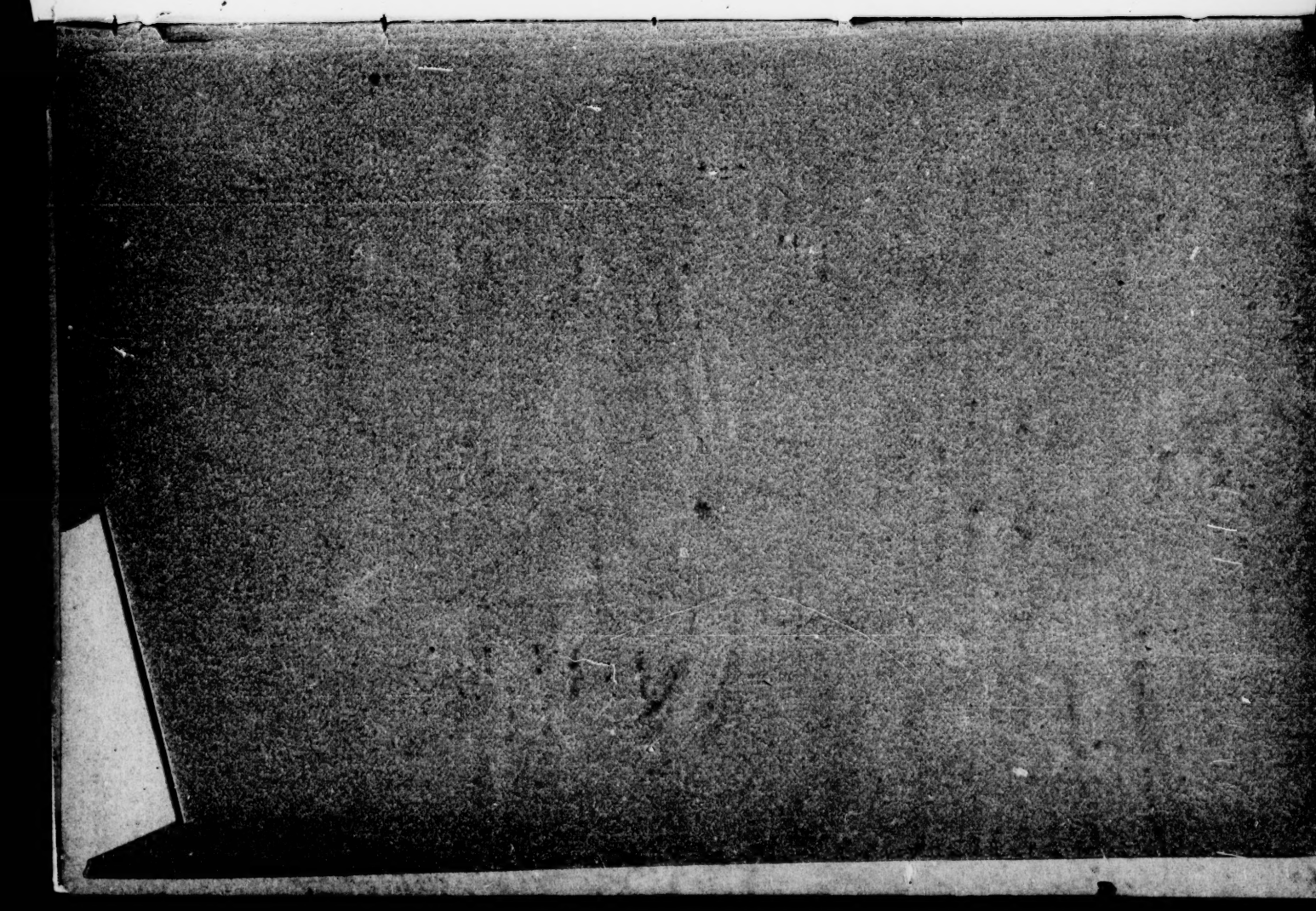

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APPENDIX TO BRIEFS FILED CONTAINING VARIOUS ACTS OF THE LEGISLATURE OF LOUISIANA, REFERRED TO IN THE PLEADINGS AND ARGUMENT.

Extracts from "An Act to incorporate the New Orleans Gas Light and Banking Company, approved April 1, 1835.

SECTION 36. *Be it further enacted, etc.*, That the New Orleans Gas Light and Banking Company, their successors and assigns, shall have and be entitled to the sole and exclusive privilege of vending gas lights in the City of New Orleans and its faubourgs, and the City of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same.

SECTION 37. *Be it further enacted, etc.*, That in order to enable the said company to carry the foregoing section into effect, they shall be authorized to lay pipes or conduits, at the expense of the company, in any of the streets of the said city and its faubourgs, and the streets of the City of Lafayette, where the same may be required, in such manner as may produce the least possible inconvenience to the city or its inhabitants; and, *provided, also*, that the Company shall afterwards repair the streets they have broken, with the least possible delay; and in case said

company should fail reinstating the paved street so broken to the satisfaction of the Surveyor of the City of New Orleans, or of the Mayor, said Company shall be liable to pay a fine not exceeding one hundred dollars, at the discretion of the Court, for each day of such neglect or refusal, which fine shall be recovered to the profit of the city, before any competent tribunal; and further, the Mayor or the Surveyor, can order the said paving to be reinstated in a proper manner, at the expense of said company; *provided*, said Company can always establish, by the report of two experts to be appointed by the parties, and of one expert to be appointed by the Court, that the paving has been properly reinstated; and *provided further*, that the above provision shall apply also to the City of Lafayette.

SECTION 42. *Be it further enacted, etc.*, That when, after the expiration of forty years, the corporation of New Orleans should resolve to buy the said Gas Works, from the New Orleans Gas Light and Banking Company, which they hereby shall have the right to do, the price shall be fixed by arbitrators, five of whom shall be chosen by the President and directors of the Company, and five by the City Council of New Orleans; said arbitrators not to be stockholders in said company, nor members of the City Council of New Orleans; said arbitrators shall take into consideration the value of the Gas Works, grounds, buildings and everything thereunto appertaining, and if they agree and so report in writing, their award shall be binding on the parties; but if they should not agree, the Judge of the District Court of the First Judicial District, or Judge of any other court of competent jurisdiction, shall appoint, as umpires, five disinterested individuals as above, whose decision and award in writing, reported to the court above, shall be binding and conclusive, any law to the contrary notwithstanding; the amount so agreed upon shall be payable in the bonds of the Mayor, Aldermen and inhabitants of New Orleans, bearing interest at five per cent. per annum, payable semi-annually, and redeemable in not less than ten, nor more than thirty years from the day on which

said award shall be signed, and the said Gas Works delivered over to the said corporation of New Orleans; *provided*, all the works and placing of main pipes, and lamp posts shall have been made at the expense of the company.

SECTION 43. *Be it further enacted, etc.*, That in case the Mayor, Aldermen and inhabitants shall decline purchasing the said Gas Works, as provided for in section forty-second, and so notify the New Orleans Gas Light and Banking Company, at any time within one year after the time specified in said section forty-second, the bonds given by the corporation of New Orleans for the amount of stock owned by the said corporation, shall be renewed by the New Orleans Gas Light and Banking Company for twenty years, on the same terms and conditions as those upon which they were originally given; *provided, however*, the amount formed by the sinking fund herein before provided, shall be applied to the payment of said bonds as far as it will go, and the bonds only renewed for such balance as may not be made up by the aforesaid sinking fund.

AN ACT.

To amend the Charter of the New Orleans Gas Light and Banking Company.

WHEREAS, The Stockholders of the New Orleans Gas Light and Banking Company have, by their memorial, petitioned to be permitted to surrender so much of their Charter as grants to them the privilege of Banking;

SECTION 1. *Be it therefore enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That said surrender is accepted, and that so much of the Act approved the first day of April, one thousand eight hundred and thirty-five, incorporating said New Orleans Gas Light and Banking Company, and of all supplementary Acts as authorizes the said Company to carry of the business on banking, is repealed. *Provided* that all the debtors of the branches of the said bank, furnishing good and sufficient security, shall have for the first

two years the privilege of renewing their notes or other obligations, or delaying the payment thereof, by the payment each year of ten per centum upon the whole amount due by them, exclusive of interest, and after that period, on the payment of fifteen per centum annually, exclusive of interest upon the whole amount, until the entire debts are paid and extinguished; *provided*, the place of payment shall not be changed without the consent of the debtor, and that the debtor shall not be required to give security out of the parish from which any branch may be withdrawn.

SECTION 2. *Be it further enacted, etc.*, That so much of said Act, and of all others in relation thereto, as authorizes said Company to make and vend gas within the City of New Orleans and its faubourgs, with all the rights and privileges thereby granted, subject to all the clauses and conditions thereto annexed, be continued in force, under the name and title of the "New Orleans Gas Light Company," until the first day of April, one thousand eight hundred and seventy-five, at which period all the corporate privileges of the said Company shall expire; and *provided* the said Gas Light Company shall never raise the price of gas above six dollars per one thousand cubic feet; and shall give up the right of extending its operations beyond the corporate limits of the three municipalities of the City of New Orleans; and *provided* further, that all the privileges conferred in the thirty-fifth section of the original Act dated the first day of April, eighteen hundred and thirty five, be repealed.

SECTION 3. *Be it further enacted, etc.*, That all the rights of property, whether movable or immovable, corporeal or incorporeal, with their mortgages, privileges and rights of action shall be transferred to and invested in said New Orleans Gas Light Company, who shall, by the mere acceptance of this Act, assume all the debts, dues and responsibilities of the said New Orleans Gas Light and Banking Company, and that all the holders of notes, depositors, and other creditors of said bank shall be paid

out of the assets and property so transferred by preference and privilege over all other debts to be hereafter contracted by said Gas Light Company.

SECTION 4. *Be it further enacted, etc.*, That the capital of said Company be reduced to one million two hundred thousand dollars, divided into twelve thousand shares of one hundred dollars each, to be apportioned among the stockholders of said New Orleans Gas Light and Banking Company, and that the number of directors be reduced to six, three of whom shall form a quorum, for the transaction of ordinary business, and a majority of whom have authority to make all by-laws, rules and regulations necessary and useful and not inconsistent with the Constitution of this State, or of the United States, or of this Charter.

SECTION 5. *Be it further enacted, etc.*, That the said New Orleans Gas Light and Banking Company shall execute a full release and discharge of all claims they may have against the Charity Hospital, and that, during the continuance of the Charter of the said New Orleans Gas Light, Company they shall furnish the said Charity Hospital all the gas and fixtures necessary for lighting the same, free of charge.

SECTION 6. *Be it further enacted, etc.*, That this Act shall not be in force until at a meeting of the stockholders, to be convened at their banking house in this city, by publications, inserted during thirty days, in one or more public gazettes of the cities of Philadelphia, New York and New Orleans, the same shall have been accepted, by not less than two-thirds of the stockholders so convened, a copy of whose proceedings shall be lodged in the office of the Secretary of State.

(Signed) A. BOUDOUSQUIE,
Speaker of the House of Representatives.

(Signed) F. GARCIA,
President of the Senate.

Approved March 10th, 1845.

(Signed) A. MOUTON,
Governor of the State of Louisiana.

AN ACT

To amend the Charter of the New Orleans Gas Light Company.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened.* That the second section of an Act entitled, "An Act to amend the Charter of the New Orleans Gas Light and Banking Company," approved March tenth, eighteen hundred and forty-five, be repealed, and that the said second section be, and is hereby re-enacted in the following words to-wit: That so much of said Act, and of all other Acts in relation thereto, as authorizes said Company to make and vend gas within the City of New Orleans and its faubourgs, with all the rights and privileges thereby granted, subject to all the clauses and conditions thereto annexed, be continued in force under the name and title of the "New Orleans Gas Light Company," until the first day of April, one thousand eight hundred and seventy-five—at which period all the corporate privileges of the said Company shall expire: provided, the said Gas Light Company shall never raise the price of gas above four dollars and fifty cents per one thousand cubic feet; and *provided further*, that all the privileges conferred in thirty-fifth section of the original Act, dated the first day of April, eighteen hundred and thirty-five, be repealed.

SECTION 2. *Be it further enacted, etc.*, That in order to enable the New Orleans Gas Light Company to supply the Fourth District of the City of New Orleans with gas, agreeably with the original Act, approved April first, eighteen hundred and thirty-five, the said Company may, from time to time, increase the amount of their capital stock until it shall reach one million five hundred thousand dollars.

SECTION 3. *Be it further enacted, etc.*, That this Act shall not be in force until at a meeting of the stockholders, to be convened at their office in the City of New Orleans, by publications inserted during thirty days in one or more public gazettes of the Cities of Philadelphia, New York and New Orleans, the same

shall have been accepted by not less than two-thirds of the stockholders in value so convened, a copy of whose proceedings shall be lodged in the office of the Secretary of State.

(Signed) JOHN M. SANDIDGE,
Speaker of the House of Representatives.

(Signed) ROBERT C. WICKLIFFE,
President pro tem. of the Senate.

Approved March 15th, 1854.

(Signed) P. O. HEBERT,
Governor of the State of Louisiana.

A true copy:

ANDREW S. HEPBON,
Secretary of State.

AN ACT

To extend the area of "Gas Lighting" in the City of New Orleans, and to reduce the price now paid by consumers.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the charter of the "New Orleans Gas Light Company," as now established by law, shall remain in full force and effect until the first day of April A. D. 1895: *Provided*, That nothing in this Act shall be construed so as to continue the exclusive privilege granted to said Company beyond the period fixed by its present act of incorporation, subject, however, to the following additional conditions and restrictions:

First. The "New Orleans Gas Light Company," from and after the first day of January, 1861, shall reduce the price of gas to four dollars per one thousand cubic feet to all consumers, and shall never thereafter have the right to increase the same.

Second. It shall be the duty of the said Company within three years from and after the first day of July, 1860, to lay down not less than fifteen miles of main pipes through the four "Districts of the City," according to their respective wants.

Third. The said "New Orleans Gas Light Company," shall and they are hereby further required to lay down free of charge the main pipes necessary for lighting the levee on river front of the city, whenever required so to do by the "Common Council."

And Whereas, in order to carry out and faithfully perform the preceding conditions, it may be necessary for the said Company to increase their capital stock: therefore

SECTION 2. *Be it further enacted, etc.,* That the "New Orleans Gas Light Company," shall have the power to increase, from time to time, the capital stock of the said Company as the Board of Directors may determine, to an amount which shall not exceed "one million of dollars."

SECTION 3. *Be it further enacted, etc.,* That this Act shall not have effect until, at a meeting of the stockholders of said "Gas Light Company," to be convened at their office in New Orleans, by publication inserted during thirty days in one or more public gazettes of said city, the same shall have been accepted by not less than two-thirds of the stockholders in value so convened, a copy of whose proceedings shall be lodged in the office of the Secretary of State.

C. H. MORRISON,
Speaker of the House of Representatives.
HENRY M. HYAMS,
Lieut.Gov. and President of the Senate.
THOMAS O. MOORE,
Governor of the State of Louisiana.

Approved March 1st, 1860.

No. 97] AN ACT

To incorporate the Crescent City Gas Light Company.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened:* That JOSEPH H. OGLESBY, WILLIAM CREEVY, FRANCIS J. HERRON, F. W. PERKINS, S. D. MCPHERSON, GEORGE F. SHERMAN, W. B. CORNELL, W. HAWKSWORTH, and their present and

future associates, successors and assigns, be and they are hereby constituted and declared to be, from and after the passage of this Act, a body corporate and politic, in fact and in name, by the style and title of "THE CRESCENT CITY GAS LIGHT COMPANY," and by that name they and their successors shall, and may have continual succession, and shall be persons in law, capable of suing and being sued; pleading and being impleaded; answering and being answered unto; defending and being defended in all Courts and places whatsoever; and that they and their successors may have a common seal, and may change and alter the same at pleasure; and also, that they and their successors, by the same name and style, shall be, in law, capable of holding, purchasing and conveying any estate, real or personal, for the use of said Corporation: *Provided*, That the lands, tenements and hereditaments which it shall be lawful for said Corporation to hold, shall be only such as shall be requisite for its immediate accommodation in relation to the convenient transaction of its business, and the properly carrying on and conducting of its works; or such as shall have been mortgaged to it, in satisfaction of debts contracted in the course of its dealings, or purchased at sales, upon judgments which shall have been obtained for such debts.

SECTION 2. *Be it further enacted, etc.*, That the capital stock of said Corporation shall be three million dollars, to be divided into thirty thousand shares of one hundred dollars each.

SECTION 3. *Be it further enacted, etc.*, That books for subscription to the capital stock of said Company shall be opened in New Orleans, and under the management and superintendence of the incorporators, who shall fix the time and places for receiving such subscriptions, giving due notice of the same through the daily papers; and that after seven thousand five hundred shares are subscribed, the incorporators shall call a meeting of the subscribers, for the purpose of electing a Board of Directors, whose term of office shall be until the first Tuesday of January following their election as such; *Provided*, That no one shall be elected as director who is not a resident of the State of Louisiana, and

the owner of one hundred shares of the stock; *Provided, further*, That the incorporators shall have the power to fix the per centum, to be paid upon subscribing to the stock, and the time at which further installments shall be called in, until the election of the first Board of Directors, when this power shall rest with them and their successors in office.

SECTION 4. *Be it further enacted, etc.*, That the office of said Company shall be located in New Orleans; that the works and affairs of said Company shall be managed and conducted by a board of six directors, who shall elect one of their own number President, and shall also elect a Secretary; and that from and after the first election of directors, an annual election for directors shall be held on the first Tuesday of each year, due notice of the same to be given by the Secretary of the Company through the daily papers, for thirty days previous to the time fixed for said election; the election to be held at the office of the Company; each share of stock to be entitled to one vote, either by the owner in person or by proxy, and the person receiving the highest number of votes to be declared duly elected; the Board of Directors to fix the compensation of the President and other officers and employees of the Company.

SECTION 5. *Be it further enacted, etc.*, That if any director shall remove out of the State, or cease to be a stockholder, his office shall be declared vacant; and whenever any vacancy or vacancies shall happen among the directors by death, resignation, or otherwise, such vacancy or vacancies shall be filled for the remainder of the year in which they shall happen by such person or persons as the remainder of the directors for the time being, or a majority of them shall appoint.

SECTION 6. *Be it further enacted, etc.*, That a majority of the Board of Directors shall constitute a board for the transaction of business, and shall have power to make and prescribe such by-laws, rules and regulations as shall appear needful and proper, and shall have the power of appointing as many officers, clerks

and assistants as may be necessary for carrying on the business and affairs the Company, allowing them such salary as they may see proper.

SECTION 7. *Be it further enacted, etc.*, That half yearly dividends shall be made of so much of the profits of said Company as the directors may think advisable, and that at each annual meeting for the election of directors, the outgoing directors shall lay before the stockholders a statement of all the affairs and concerns of the Company for their information.

SECTION 8. *Be it further enacted, etc.*, That the Crescent City Gas Light Company, their successors and assigns, shall have and be entitled to the sole and exclusive privilege of making and vending gas lights in the City of New Orleans, to such persons or bodies corporate who may voluntarily choose to contract for the same, for the term of fifty years, from and after the date of the expiration of the charter of the New Orleans Gas Light Company.

SECTION 9. *Be it further enacted etc.*, That to carry the foregoing section into effect, they shall be authorized after the passage of this Act, to lay pipes or conduits at the expense of the Company, in any of the streets or alleys of said City of New Orleans, where the same may be required, in such manner as may produce the least inconvenience to the City or its inhabitants; *and provided, also*, That the Company shall afterwards repair, with the least possible delay, the streets they have broken.

SECTION 10. *Be it further enacted, etc.*, That if any person or persons shall, by any means whatever, destroy any part of the gas pipes constructed or owned by the said Company, or any of their works, buildings, fixtures, or machines, such person or persons shall, each of them, be liable for all damages occasioned thereby.

SECTION 11. *Be it further enacted, etc.*, That the Crescent City Gas Light Company is authorized and empowered to manufacture gas from any and all materials suitable for such purpose, and shall have power to purchase and use any patent or patents, or the right to the same for the manufacture of such gas lights.

SECTION 12. *Be it further enacted, etc.*, That the works of said Company must be complete and in condition to supply the proper amount of gas required for the City of New Orleans, within ten years from and after the date of the passage of this Charter; and, in case of failure the Charter, to be null and void.

SECTION 13. *Be it further enacted, etc*, That all acts and parts of acts heretofore passed, conflicting in any manner with the provisions of this Act of Incoporation, are hereby repealed.

MORTIMER CARR,

Speaker of the House of Representatives.

OSCAR J. DUNN,

Lieutenant Governor and President of the Senate.

Approved April 20th, 1870.

H. C. WARMOTH,

Governor of the State of Louisiana.

No. 106] AN ACT

To amend and re-enact an act entitled "An Act to incorporate the Crescent City Gas Light Company," approved April 20th, 1870, and to fix with more precision the time when said Company shall go into operation, and to authorize said Company to issue mortgage bonds, to change the time for election of directors, and to limit the price to be charged for gas.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That an act entitled an act to incorporate the Crescent City Gas Light Company, approved April 20th, 1870, be so amended—

1. That the Board of Directors of said Corporation are hereby authorized by by-laws to determine the number of said directors, which shall consist of not less than three, nor more than nine persons; that any person who is the owner of ten shares of stock may be a director. Said Board shall elect a President and Vice President from their own body, and a Secretary and Treasurer, either members or not of their own body.

2. That the annual election for the Board of Directors shall take place on the second Tuesday of January of each year; ten days' notice of the same shall be given through two daily papers of the City of New Orleans.

3. That said Corporation shall have power to issue bonds, not exceeding in amount one million of dollars, to be secured by mortgage on the works and property of said Corporation; that the time of maturity and rate of interest of said bonds shall be fixed by the Board of Directors.

4. That the said Corporation shall not charge more than four dollars per thousand cubic feet for gas, except in case of war or blockade.

5. That the date of expiration of the charter of the New Orleans Gas Light Company, as mentioned in section eight of the Charter hereby amended, is hereby declared to be the first day of April, A. D. 1875.

SECTION 2. *Be it further enacted, etc*, That all the franchises and rights granted by the act hereby amended, and by this act, be and the same are hereby confirmed unto the said Crescent City Gas Light Company, from the first day of April, A. D. 1875, for the term fixed in their Charter.

That sections nine and twelve of the act hereby amended shall not be deemed at all affected by this act.

SECTION 3. *Be it further enacted, etc.*, That the term "City of New Orleans," as used in the eighth section of the act hereby amended, shall be deemed to include all parts of the present City of New Orleans, and any additions which may at any time be made thereto, not conflicting in any manner with the Charter of the Jefferson City Gas Light Company.

That all parts of the act hereby amended, which conflict with this act, and so far as they conflict with this act, be and the same are hereby repealed.

That all other acts, and all parts of other acts, conflicting with this act, or with the act hereby amended be and the same are hereby repealed.

CHARLES W. LOWELL,
Speaker of the House of Representatives.

C. C. ANTOINE,
Lieutenant Governor and President of the Senate

Approved July 10, 1873.

WILLIAM P. KELLOGG.
Governor of the State of Louisiana.

No 158.] AN ACT

To authorize the consolidation of business or manufacturing corporations or companies.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That any two business and manufacturing Corporations or Companies, now existing under general or special law, whose objects and business are in general of the same nature, may amalgamate, unite and consolidate said Corporations or Companies, and form one Consolidated Company, holding and enjoing all the rights, privileges, powers, franchises and property, belonging to each, and under such corporate name as they may adopt or agree upon. Such consolidation shall be made by agreement in writing, by or under the authority of the Board of Directors, and the assent of the owners of at least three-fifths of the capital stock of each of said Corporations or Companies; and a certificate of the fact of such consolidation, with the name of the Consolidated Company, shall be filed and recorded in the office of the Secretary of State: *Provided,* No such consolidation shall, in any manner, affect or impair the right of any creditors of either of said Companies. In the agreement of consolidation the number of directors of the Consolidated Company shall be specified, and the capital stock may be any amount agreed upon by the Companies or Corporations, and set forth in the Articles of Consolidation.

SECTION 2. *Be it further enacted, etc.*, That all laws or parts of laws conflicting in any manner with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect from and after its passage.

CHAS. W. LOWELL,
Speaker of the House of Representatives.
C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved December 12, 1874.

WM. P. KELLOGG,
Governor of the State of Louisiana.

J. A. WILSON.
Sheet-Metal Cans.

No. 7,923. Reissued Oct. 23, 1877.

No. 252
Wilson Packing Co. } page 72,
v.
Clapp

Fig. 1.

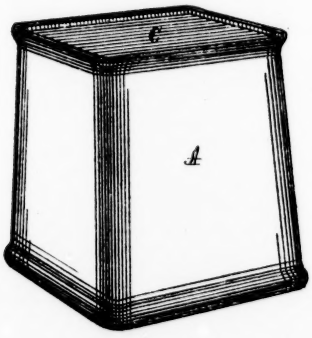
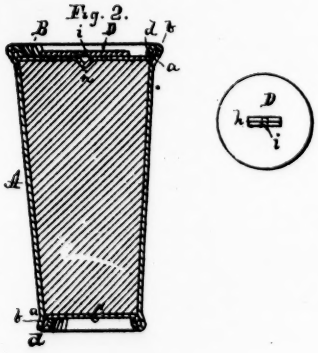


Fig. 2.



Witnesses
Forde R. Smith
H. B. Spencer

By

John A. Wilson Inventor
Munday & Evarts
his Attorneys

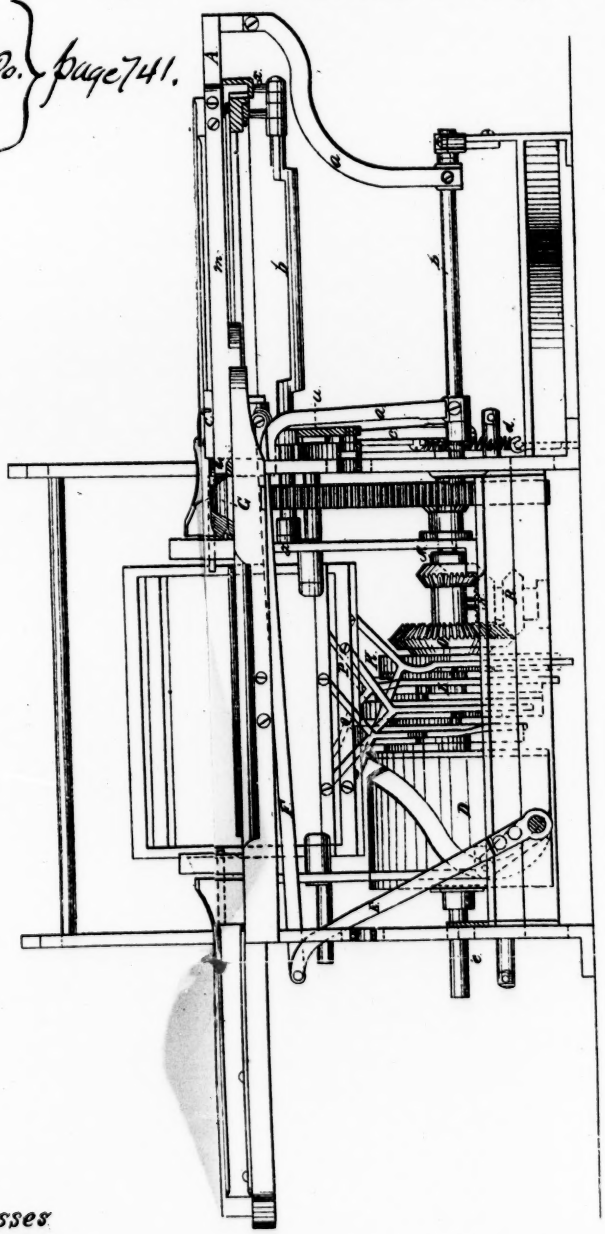
N. PETERS. Photo-Lithographer, Washington, D. C.

E. K. Davis. Sheet 1, 4 Sheets. 741

Pile Fabric.

No. 86,651. Patented Feb. 9, 1869.

No. 767
Webster Loom Co.
v.
Higgins
} page 741.



Witnesses
George C. Wright
Thomas A. Campbell

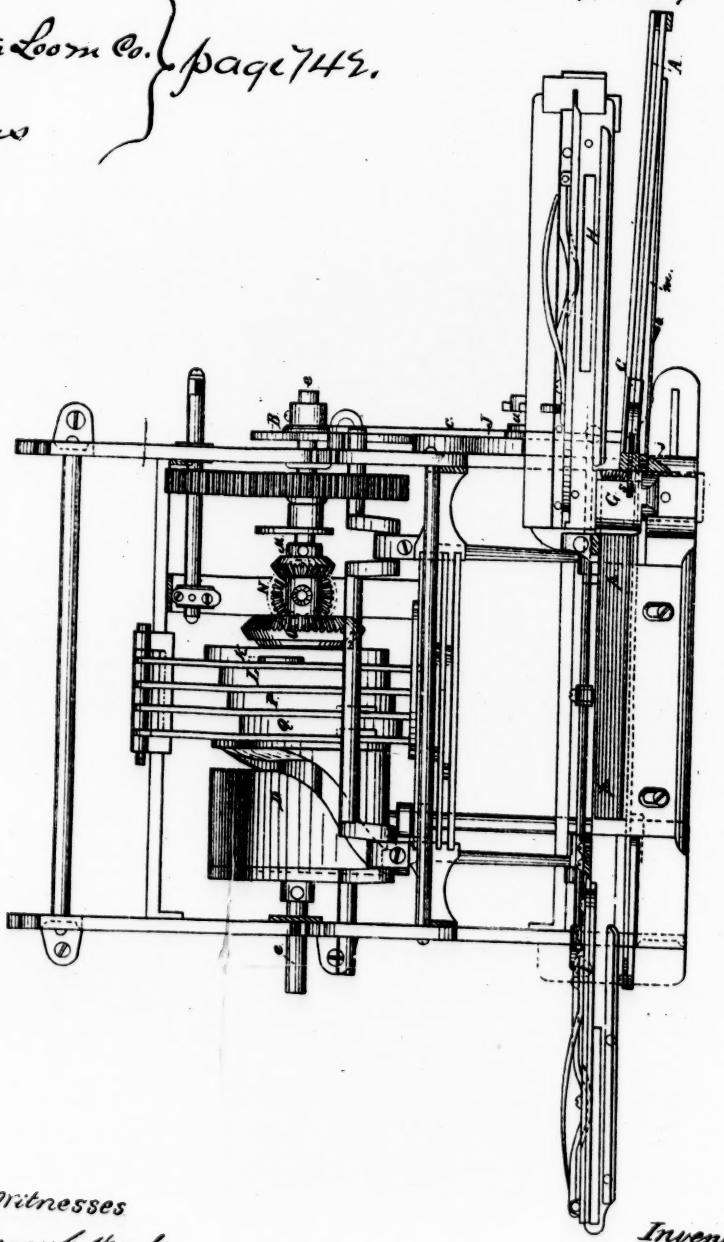
Inventor
Ezekiel K. Davis

E. K. Davis. Sheet 2, 4 Sheets. 742

Pile Fabric.

No. 86,651. Patented Feb. 9, 1869.

No. 267
Webster Loom Co.
v.
Higgins
} page 742.



Witnesses
George C. Wright
Thomas A. Campbell

Inventor
Ezekiel K. Davis

E. K. Davis. Sheet 3. 4 Sheets.

Pile Fabric.

No. 86,651. Patented Feb. 9, 1869.

No. 267
Webster Loom Co.
v.
Higgins
} page 743.

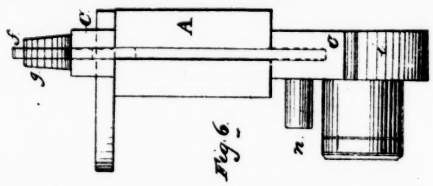
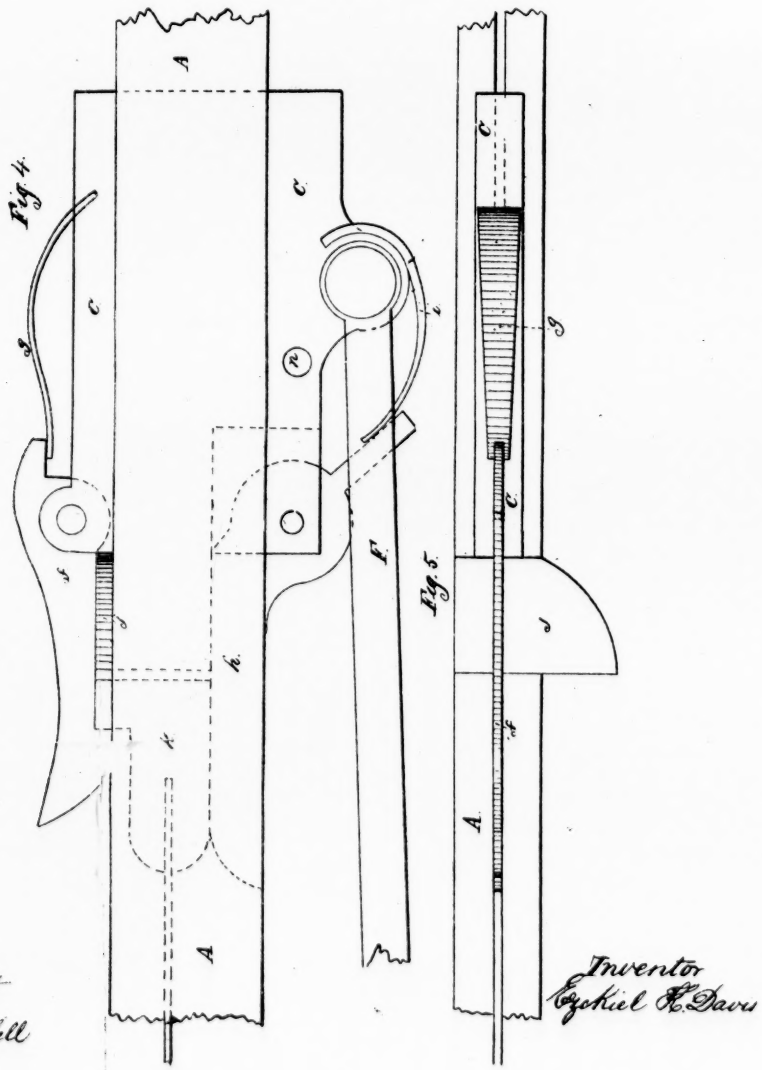


Fig. 6.

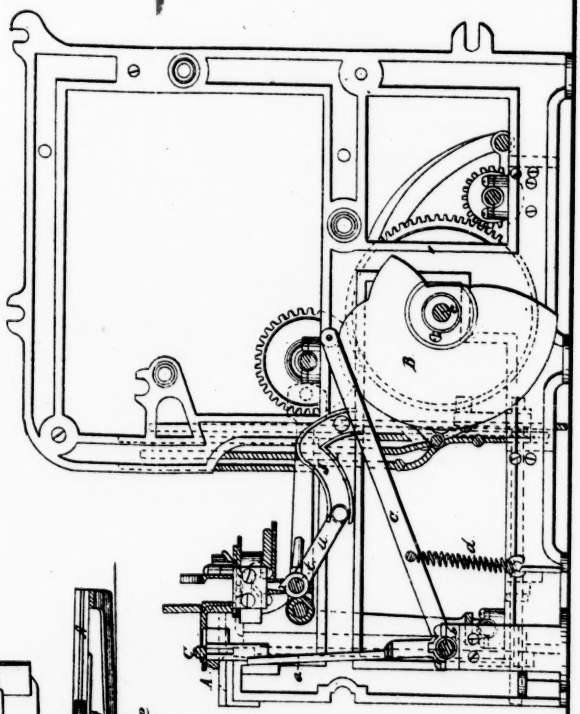


Witnesses
George C. Wright
Thomas A. Campbell

Inventor
Ezekiel K. Davis

No. 267
743 Webster Loom Co. page 744.
v.
Higgins

E. K. Davis. Sheet 4, 4 Sheets.
Pile Fabric.
No. 86,651. Patented Feb. 9, 1869.



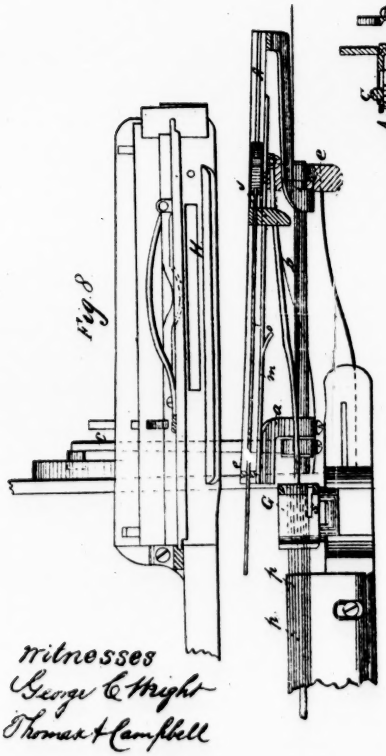


Fig. 8

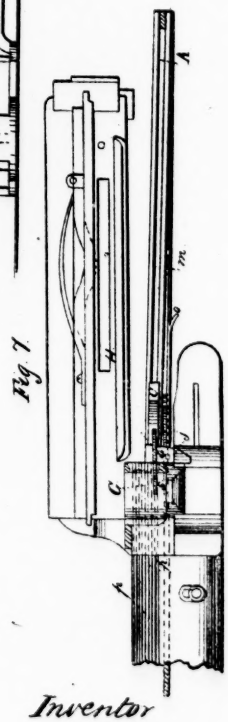


Fig. 7

Witnesses
George E. Wright
Thomas H. Campbell

Inventor
Ezekiel K. Davis

No. 267
Webster Loom Co.
v.
Higgins
page 751.

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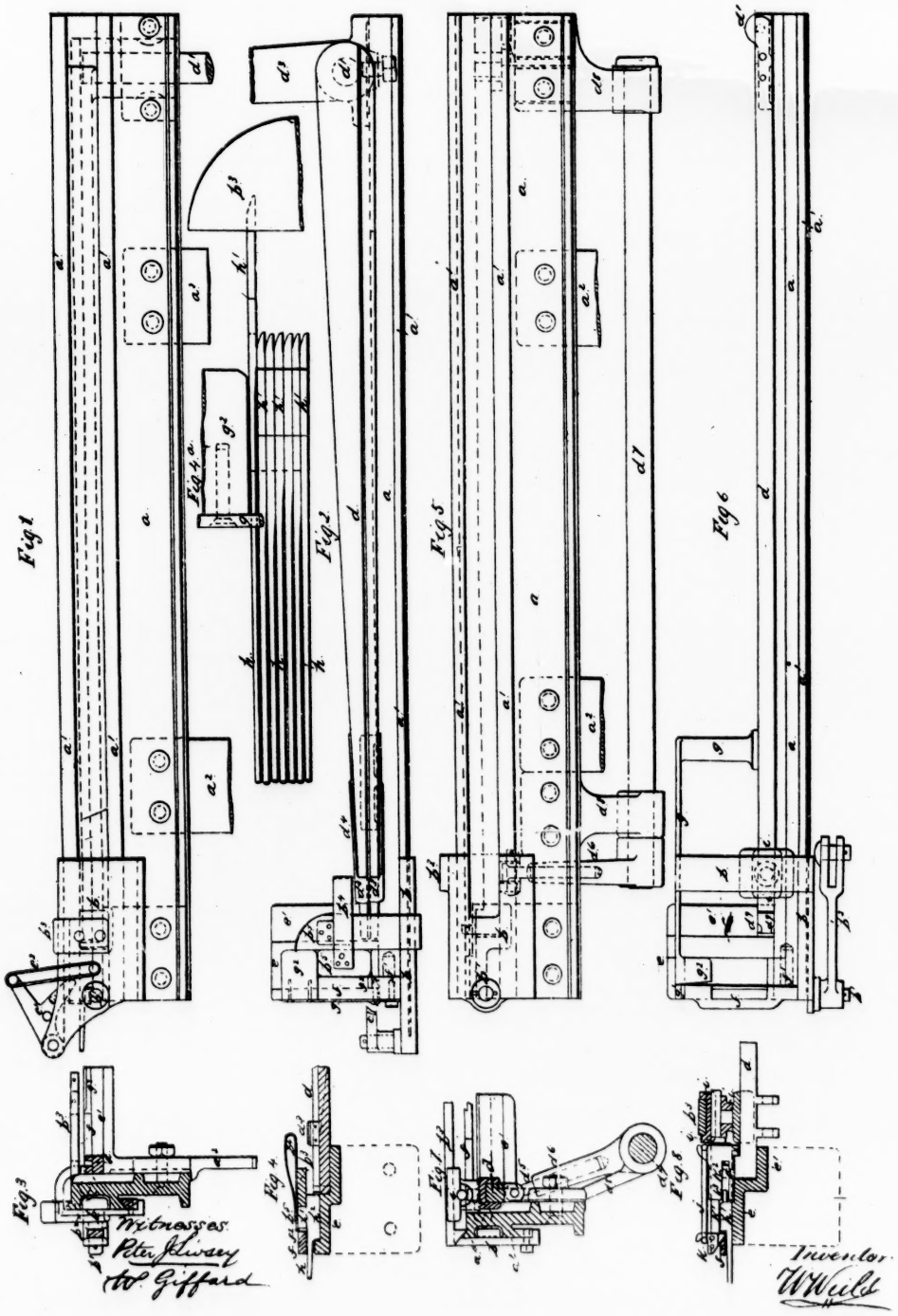
Sheet 1. 4 Sheets.

W. Weild.

Weaving Pile Fabric.

No 81,443. Patented Aug. 25, 1868.



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Wilson Loom Co.
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page 752

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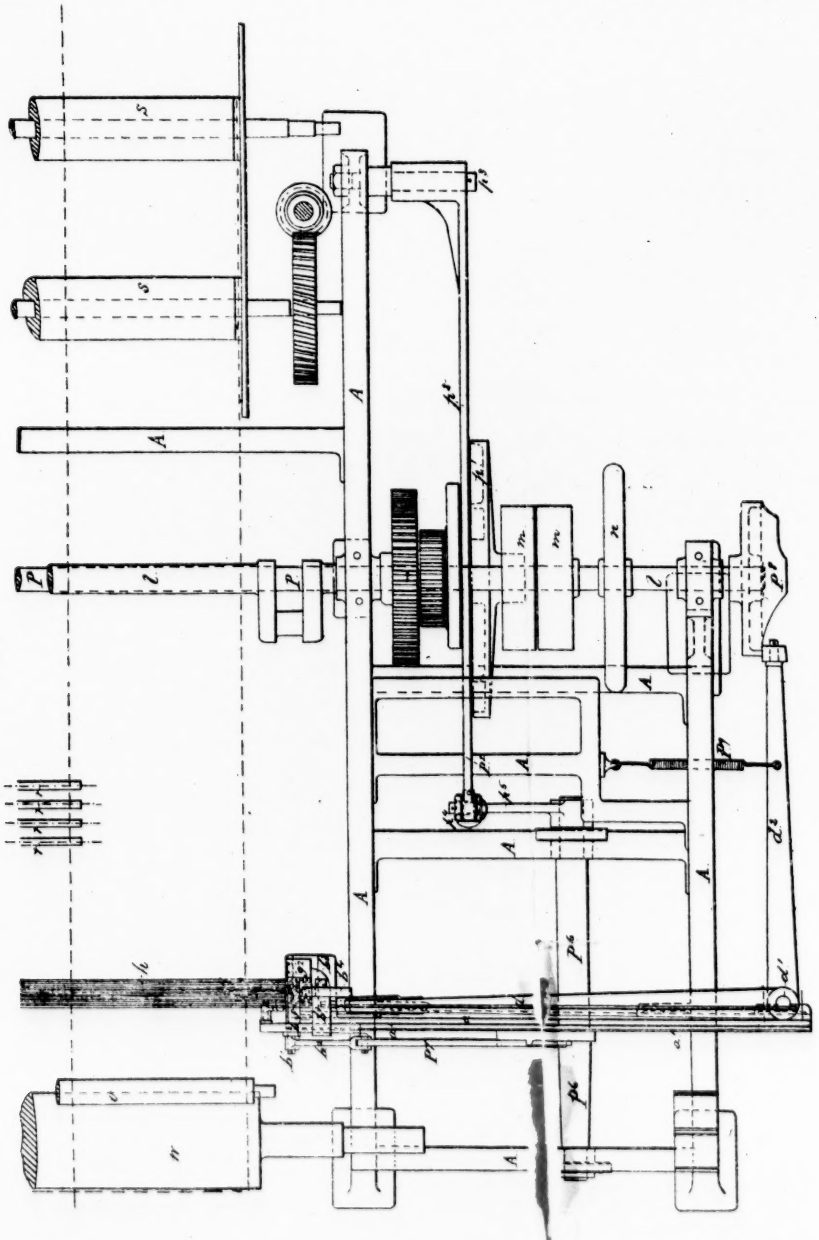
Sheet 2 - 4 Sheets.

W. Weild.

Wearing Pile Fabric.

No. 81,443. Patented Aug. 25, 1868.

Fig 9



Witnesses
Peter J. Linsey
Wm. G. Ward

Inventor
W. Weild

No. 267
Webster Loom Co.
v.
Higgins
} page 753.

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Sheet 3 - 4 Sheets.

W. Weild.

Wearing Pile Fabric.

No. 81,443. Patented Aug. 25, 1868.

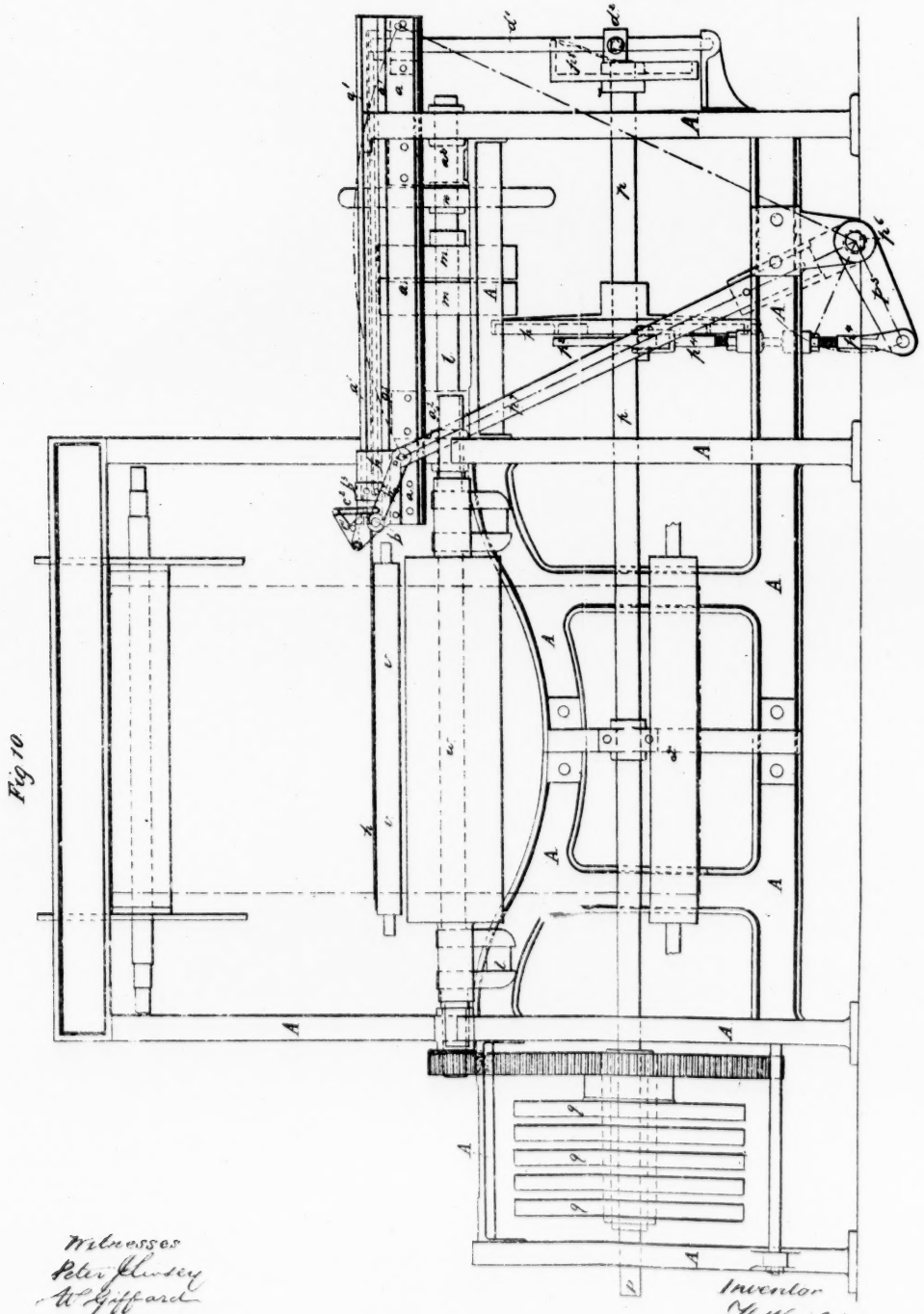

Fig 10.

Witnesses
Peter Hussey
W. Giffard

Inventor
W. Weild

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Webster Loom Co. } page 753½.
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Higgins

753½

Sheet 4-4 Sheets.

W. Weild.

Weaving Pile Fabric.

No. 81,443. Patented Aug. 25, 1868.

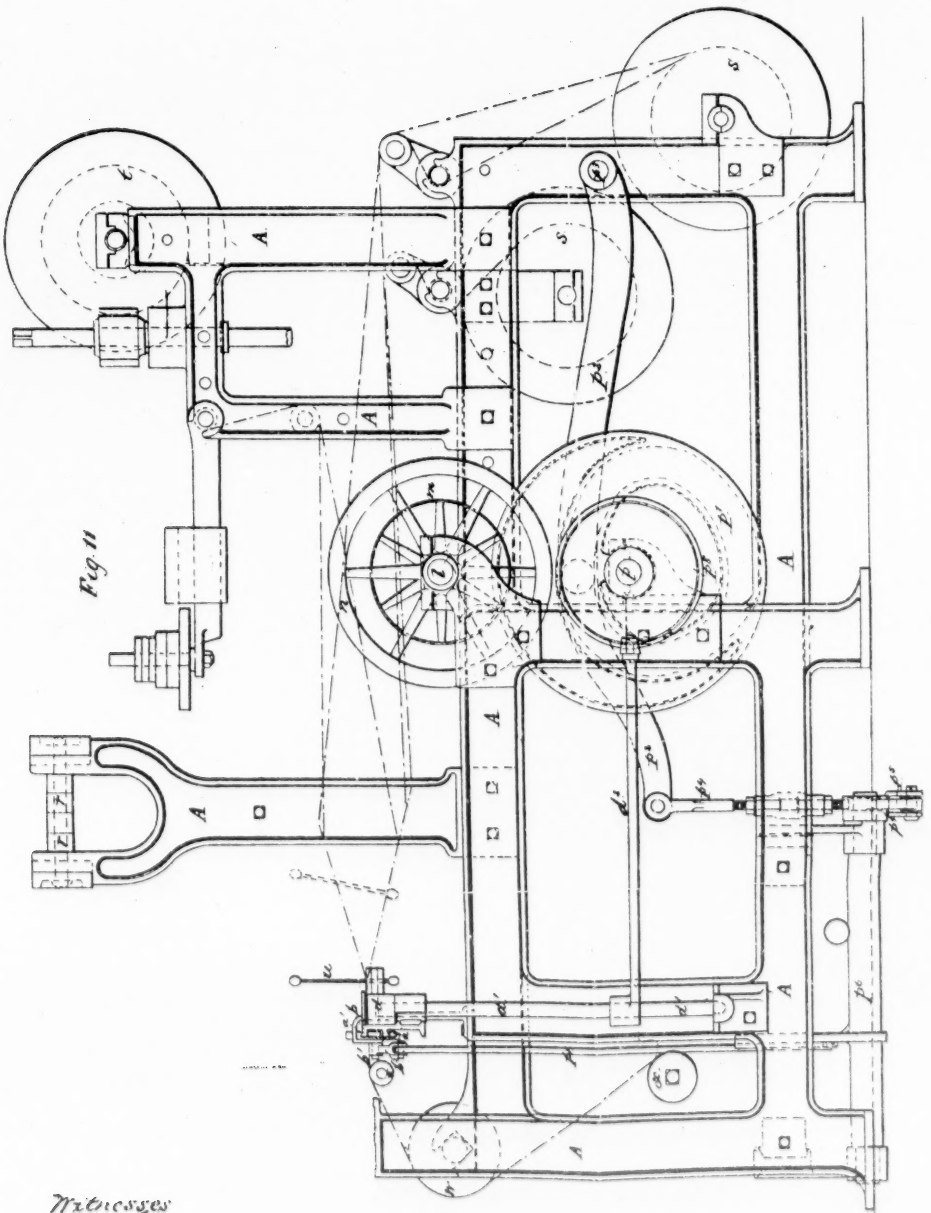

Fig 11

Witnesses
Peter Johnson
H. Gifford

Inventor
W. Weild

No. 767
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2 Sheets--Sheet 1.

W. B. & J. C. DUCKWORTH.

Wire-Actuating Mechanisms for Looms.

No. 152,088.

Patented June 16, 1874.

Fig. 1

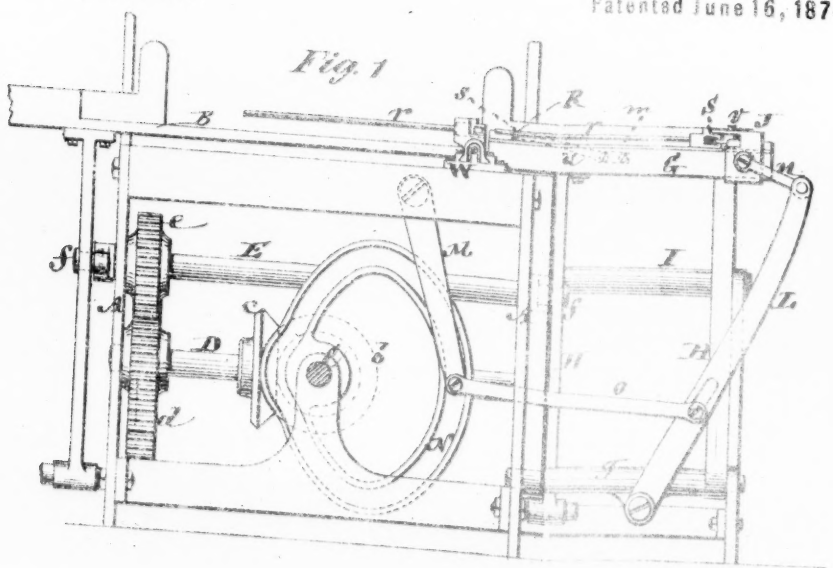
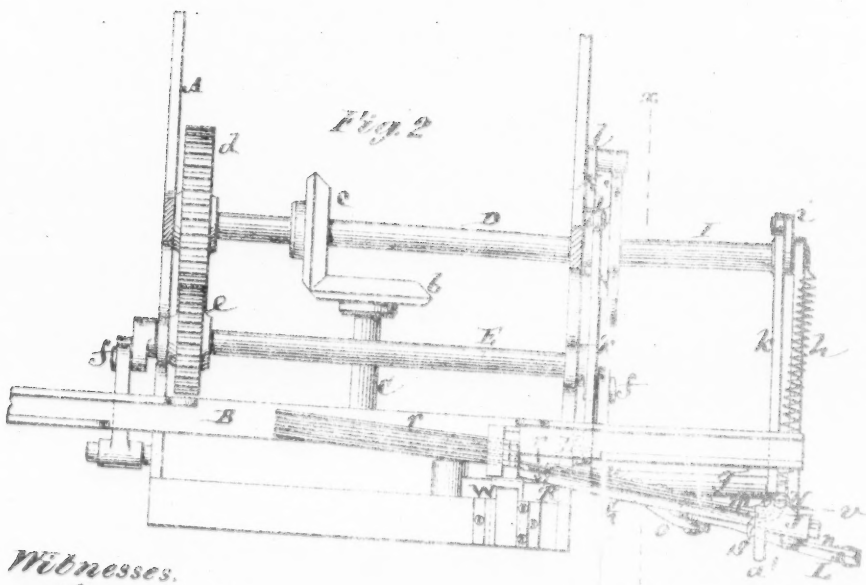


Fig. 2



Witnesses.

Michael Ryan

Fred. Haynes

Inventors.

Wm. B. Duckworth

J. C. Duckworth

by their Attorney

Thomas Allen

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Webster Loom Co.
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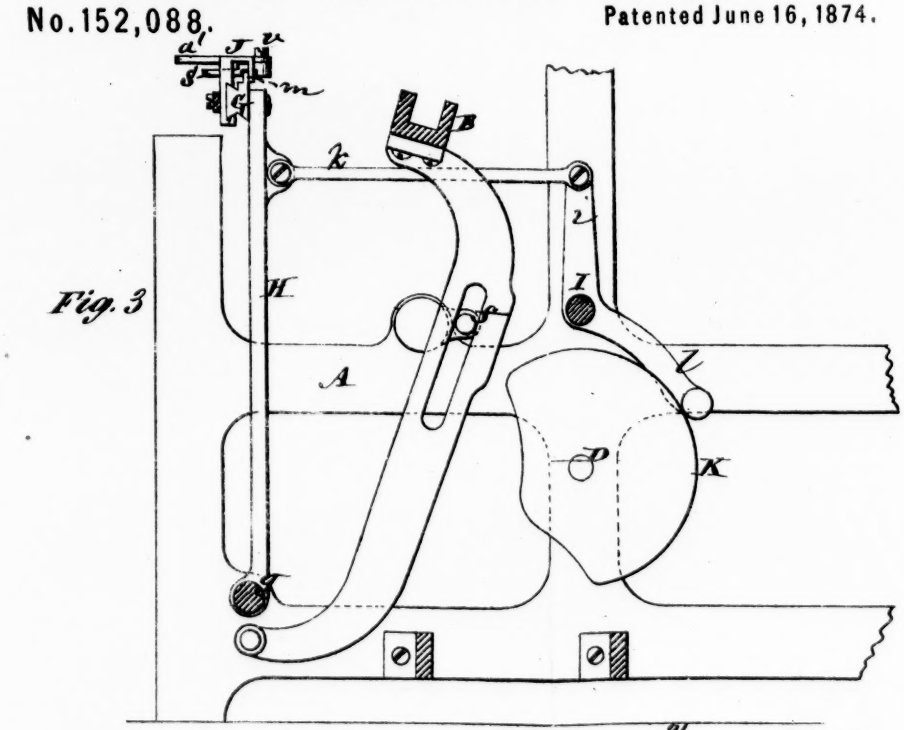
2 Sheets--Sheet 2.

W. B. & J. C. DUCKWORTH.

Wire-Actuating Mechanisms for Looms.

No. 152,088. Patented June 16, 1874.

Fig. 3



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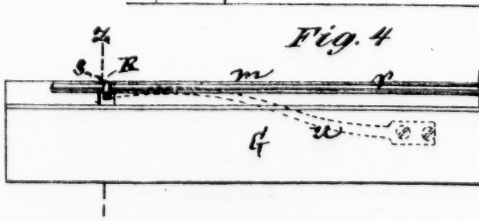

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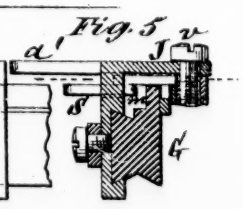
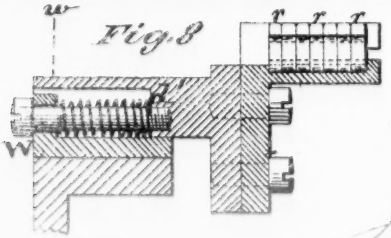


Fig. 7

Fig. 6

Fig. 8



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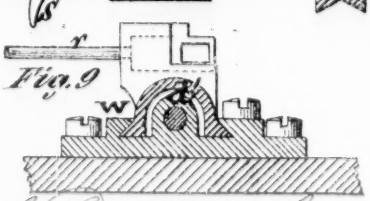

Witnesses.

J. C. Duckworth
W. B. Duckworth
by their Attorney

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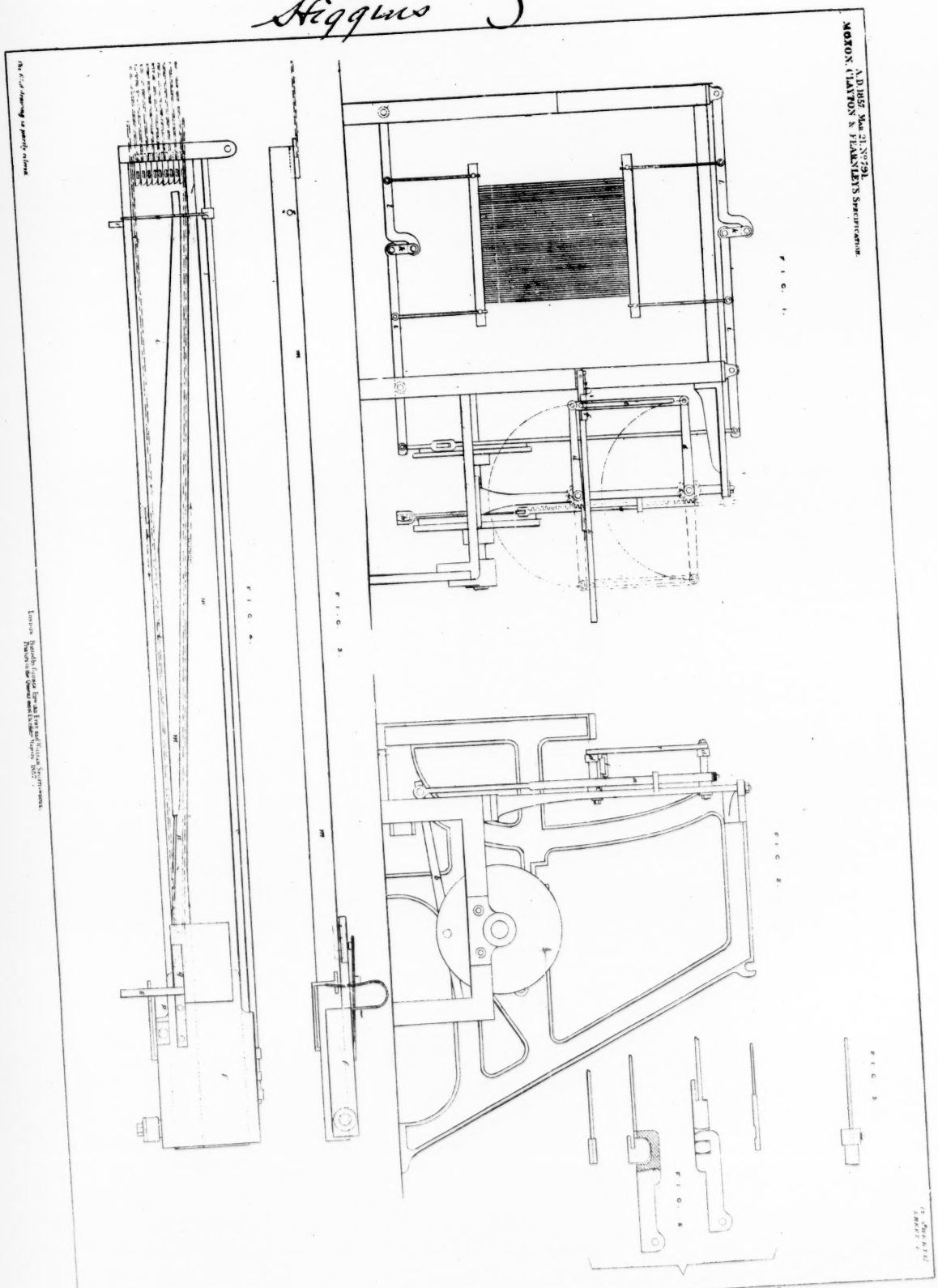

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v.
Higgins

page 765.

MOXON
A.D. 1857 Mar 21 No 779.
CLAYTON & FEARNLEYS Specification

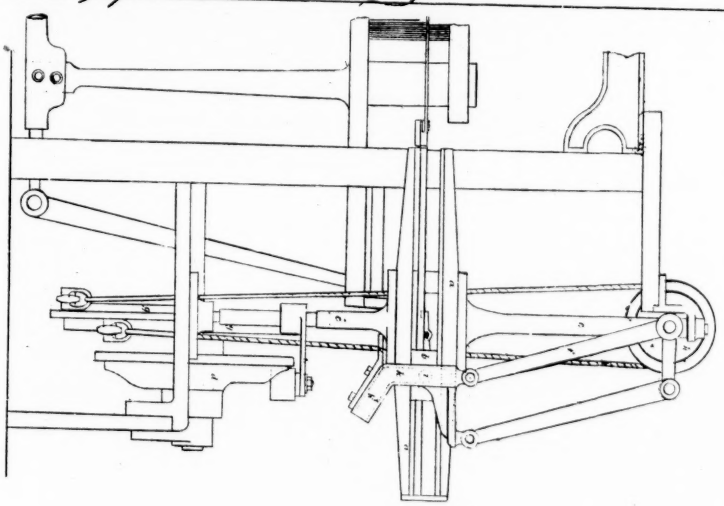


FIG. 1.

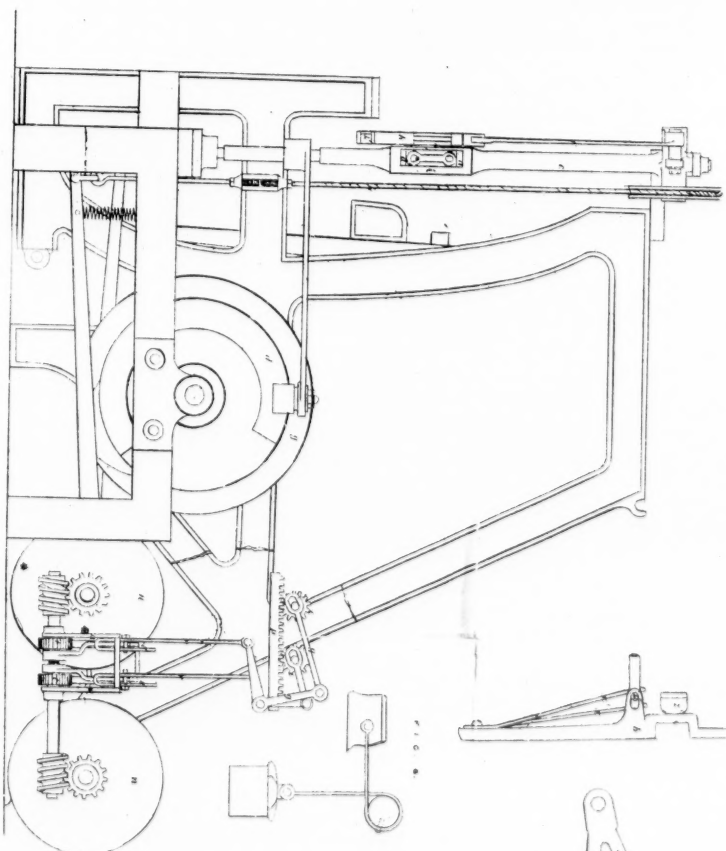


FIG. 2.

FIG. 4.

FIG. 3.

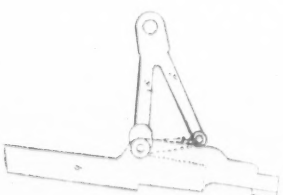


FIG. 5.

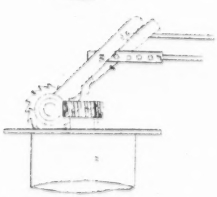
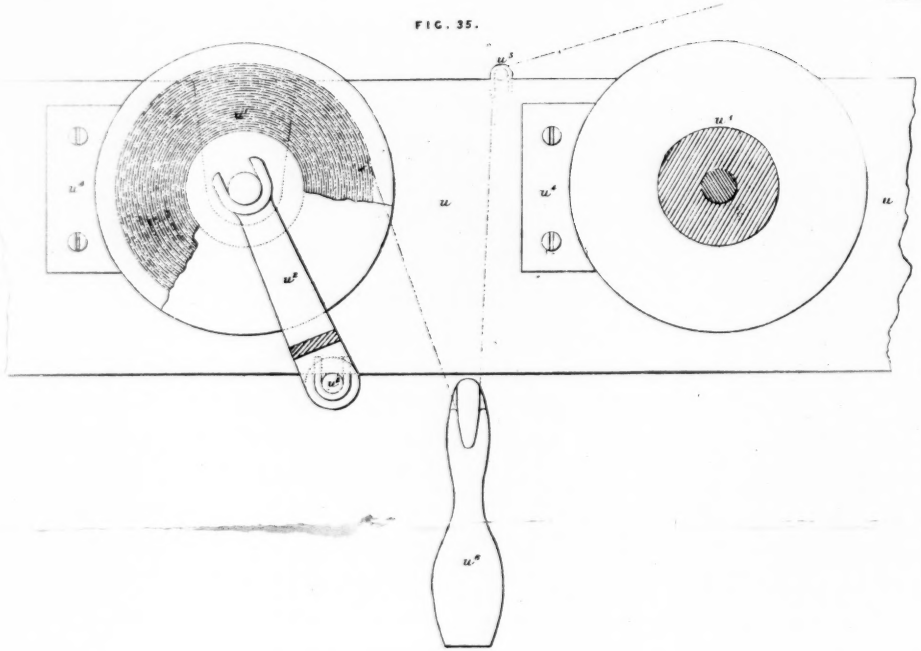


FIG. 6.

FIG. 35.



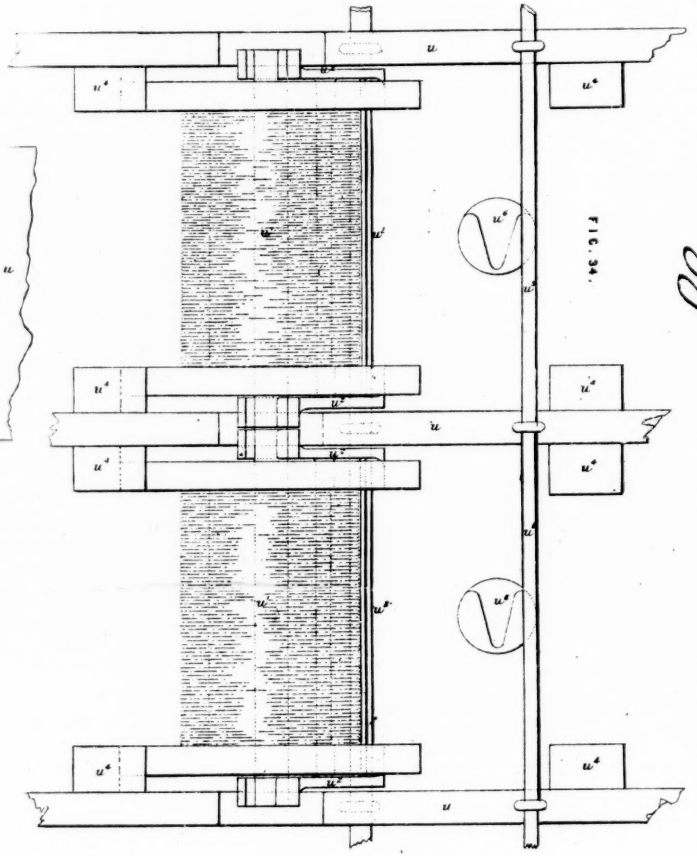


FIG. 34.

The filed drawing is not colored.

LONDON: Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE,
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Higgins

A.D. 1855 March 7. N° 505.
WEILD'S Specification.
(2nd edition)

16 Sheets; Sheet 5

FIG. 36.

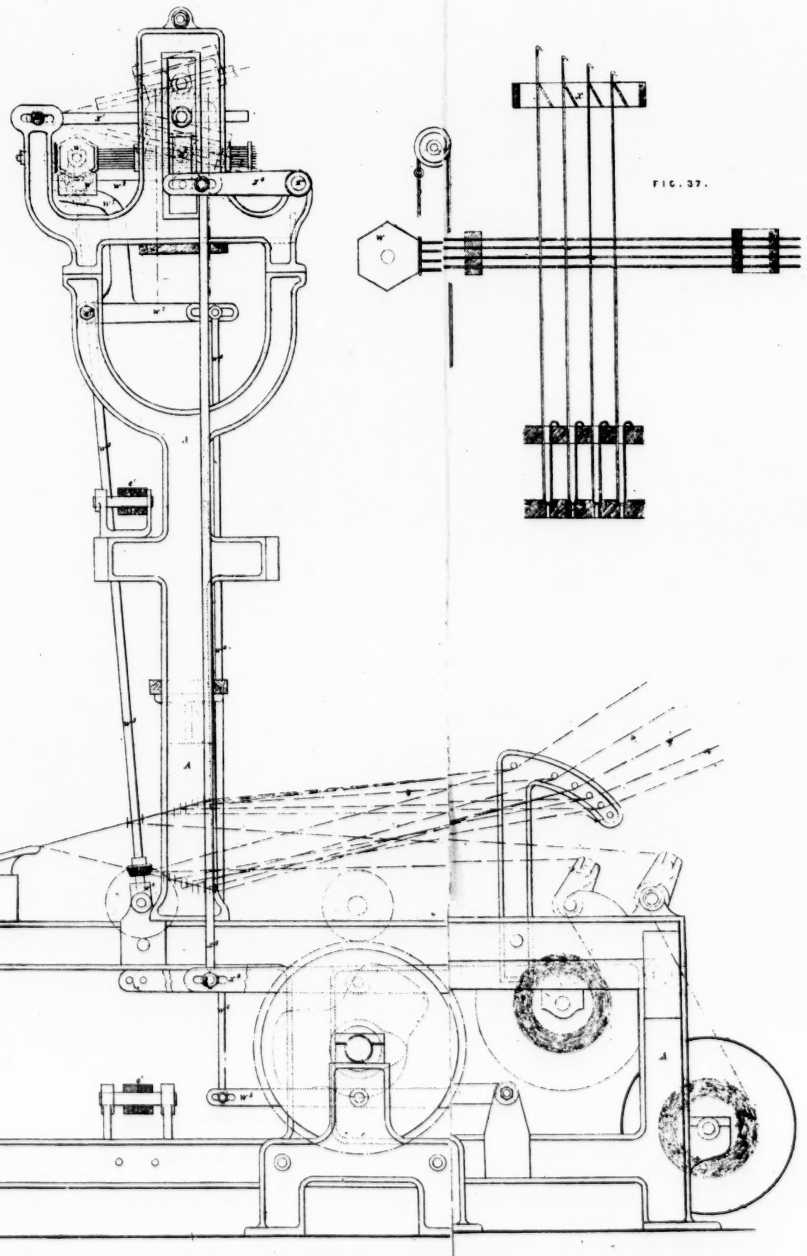

FIG. 37.

The first drawing is not colored.

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Printers to the Queen's most Excellent Majesty. 1860.

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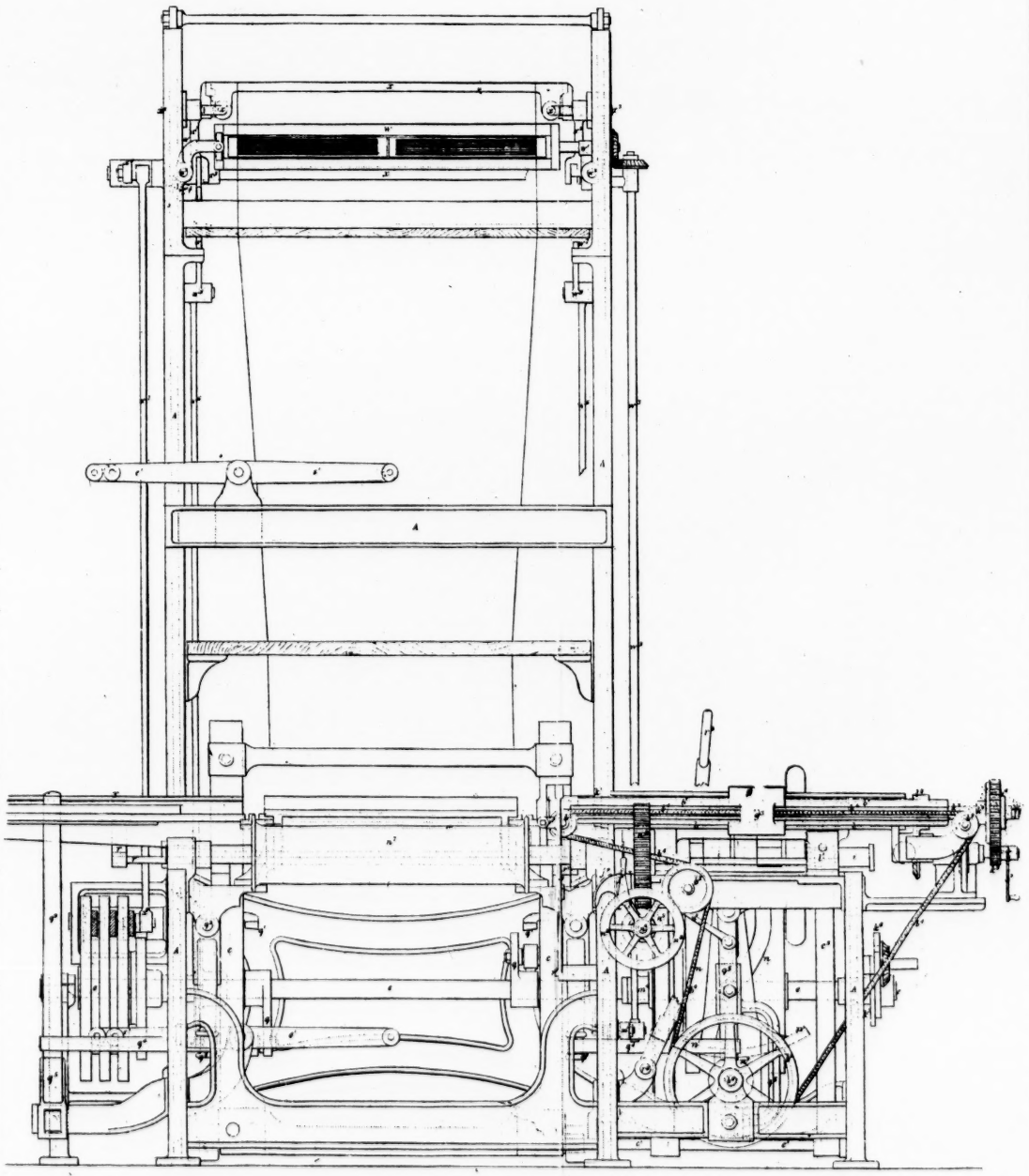
A.D. 1855. March 7. No. 580.
WEILD'S SPECIFICATION
(2nd Edition.)

6 SHEETS
SHEET 1.

FIG. 20.



The dotted drawing is not colored.

LONDON: Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE

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A.D. 1877, MAR. 7. N°505.
WEBB & S. SPECIFICATION.

FIG. 20

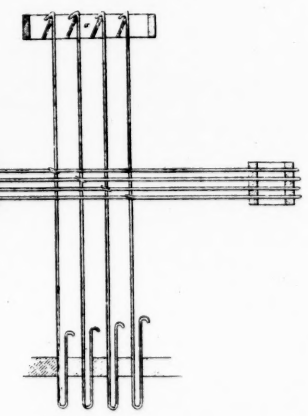


FIG. 28.

FIG. 29.

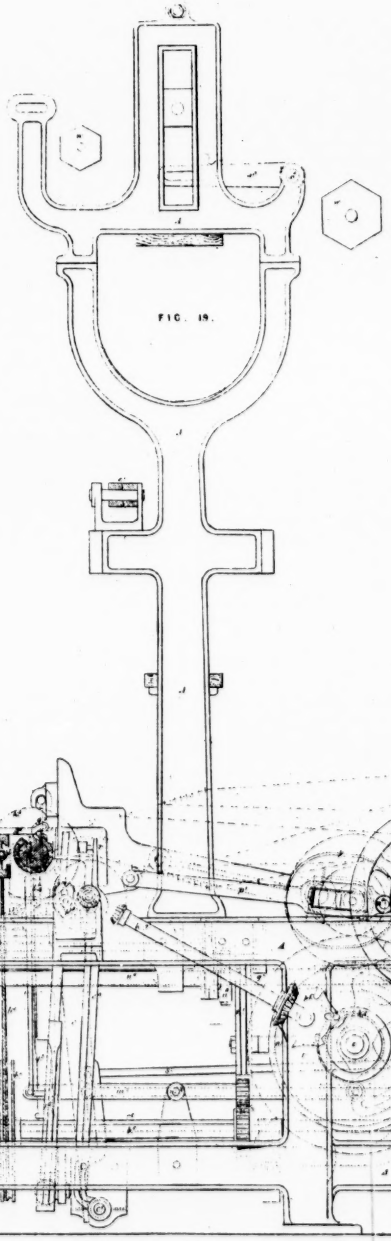
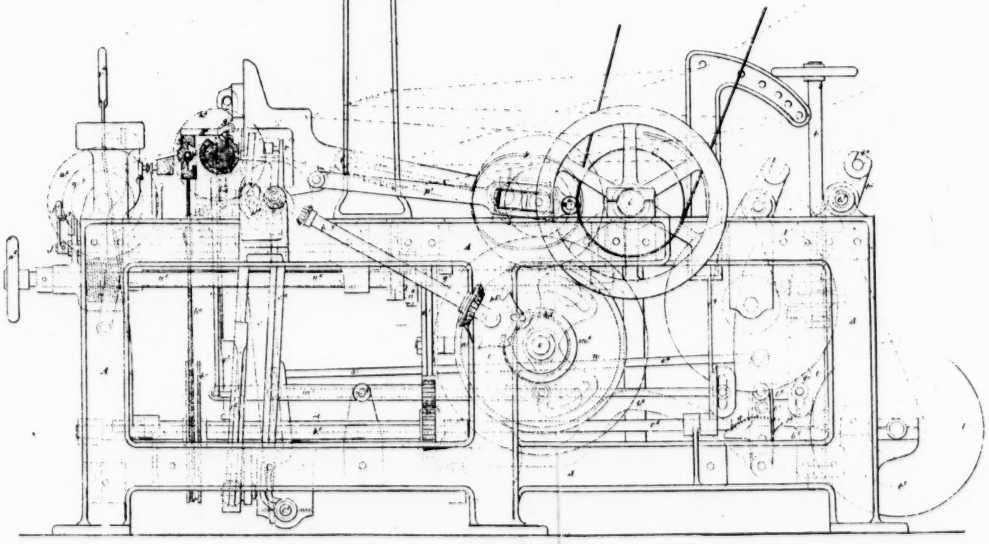


FIG. 19.



A.D. 1885 March 7. N° 505.
WEILD'S Specification.

(2nd Edition.)

FIG. 30

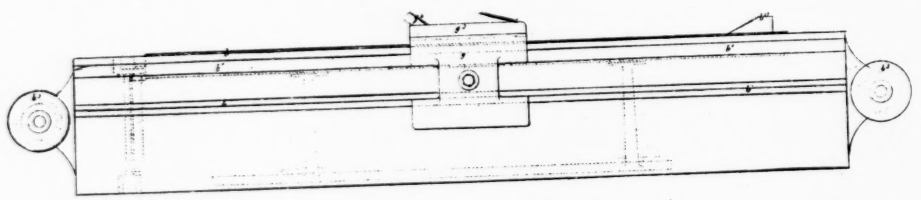


FIG. 31

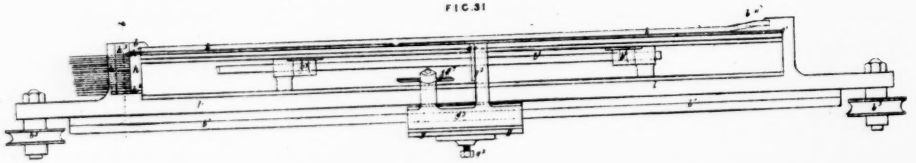


FIG. 32

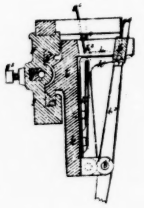


FIG. 33

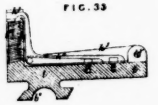


FIG. 14

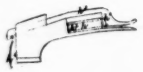


FIG. 15

FIG. 16

FIG. 17

FIG. 12

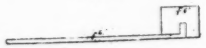


FIG. 13

FIG. 9

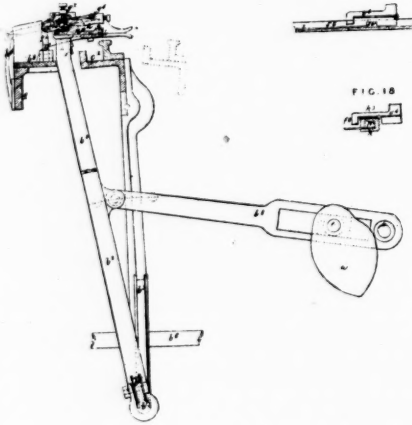
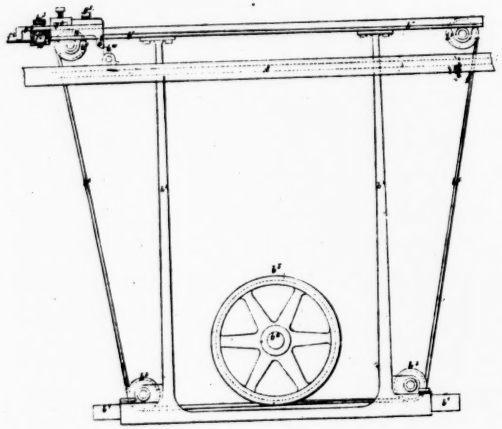


FIG. 11

FIG. 18

FIG. 10



The filed drawing is not colored.

LONDON: Printed by George Edward Eyre and William Spottiswoode,
Printers to the Queen's most Excellent Majesty. 1885

No. 667
Weild Loom Co.
v.
Higgins
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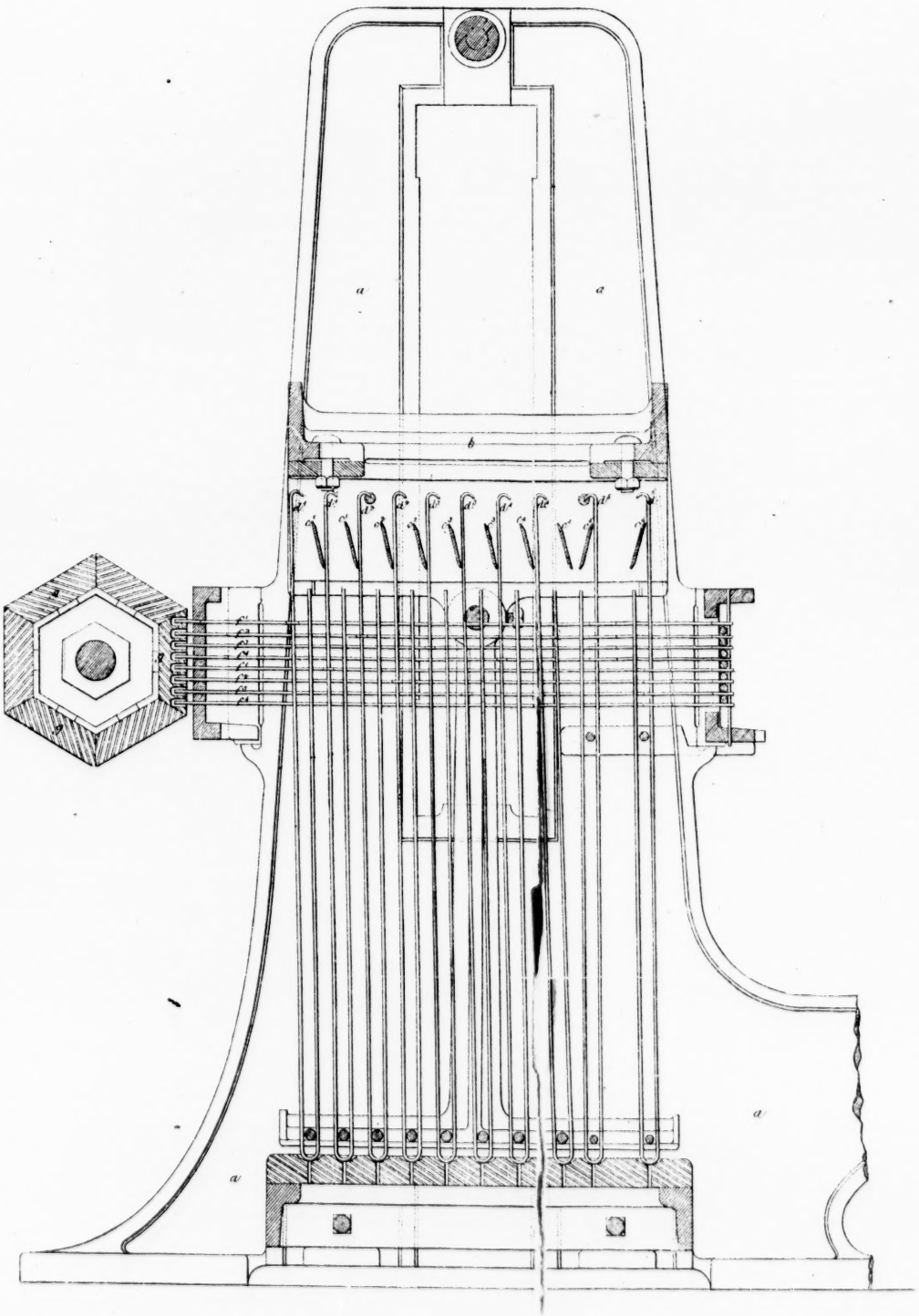
Webster Loom Co. } page 782
v.
Higgins

No. 267
Webb v. Loom & Page 193.
Higgins

A.D. 1859. MAY 27. N° 1311.
WEILD'S SPECIFICATION.

5 SHEETS
SHEET 1

FIG. 1.

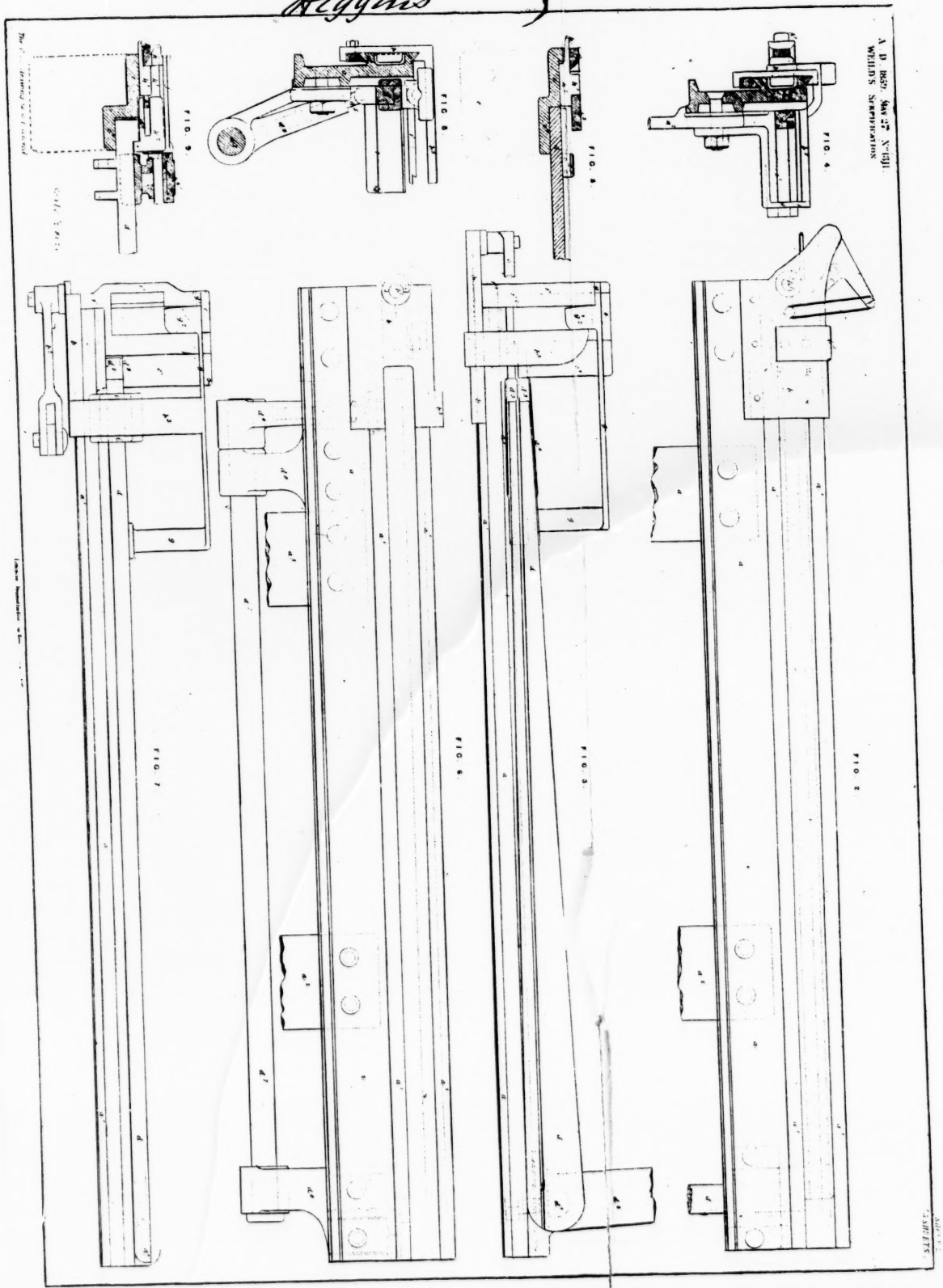


Scale $\frac{1}{2}$ Size

The filed drawing is not colored.

LONDON Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE,
Printers to the Queen's most Excellent Majesty 1859.

No. 767
Hubbell Loom Co.
v.
Higgins
} page 794.



No. 267
Webster Loom Co.
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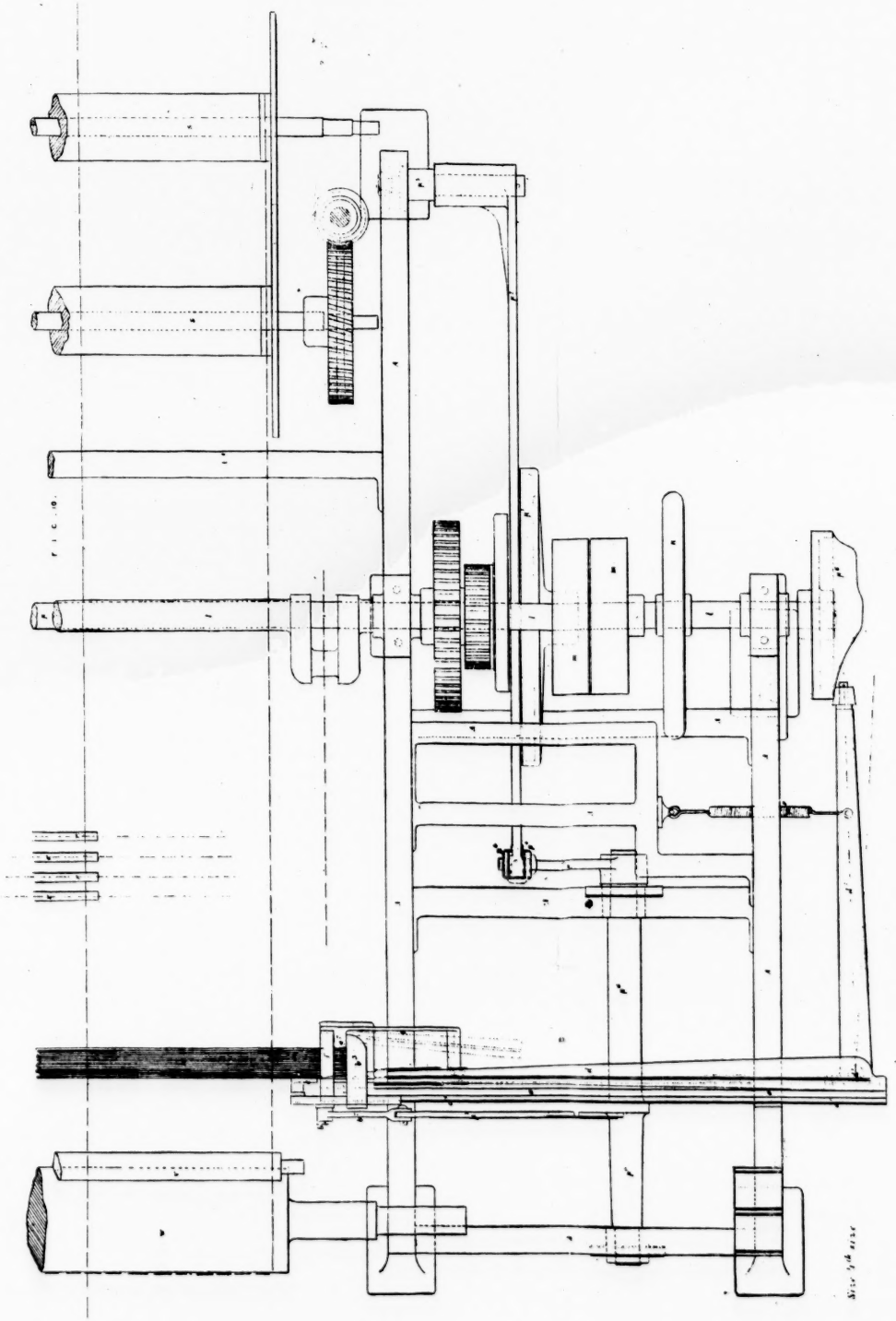
Higgins
page 795

1790



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Webster Loom Co.
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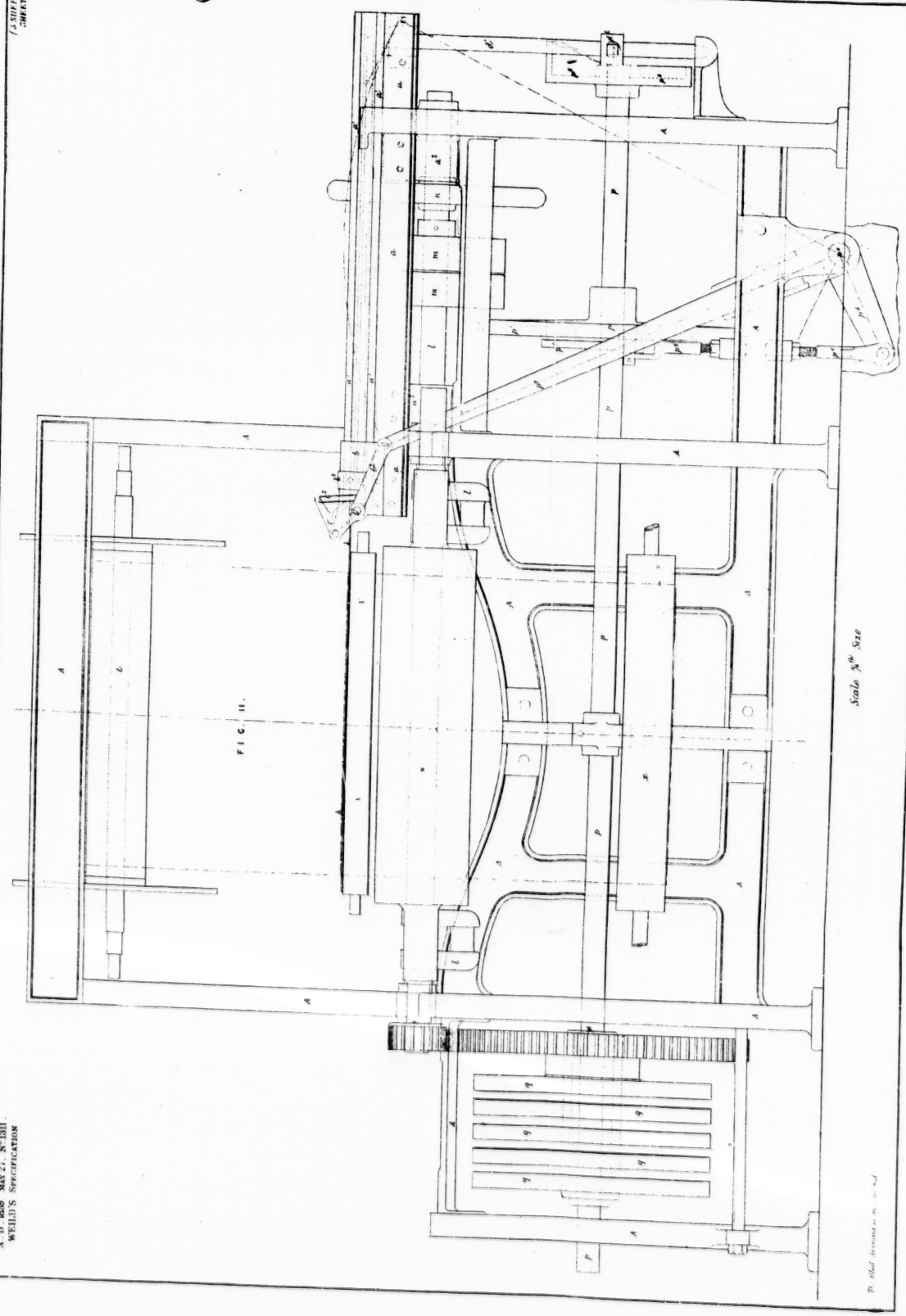
Higgins
page 795½

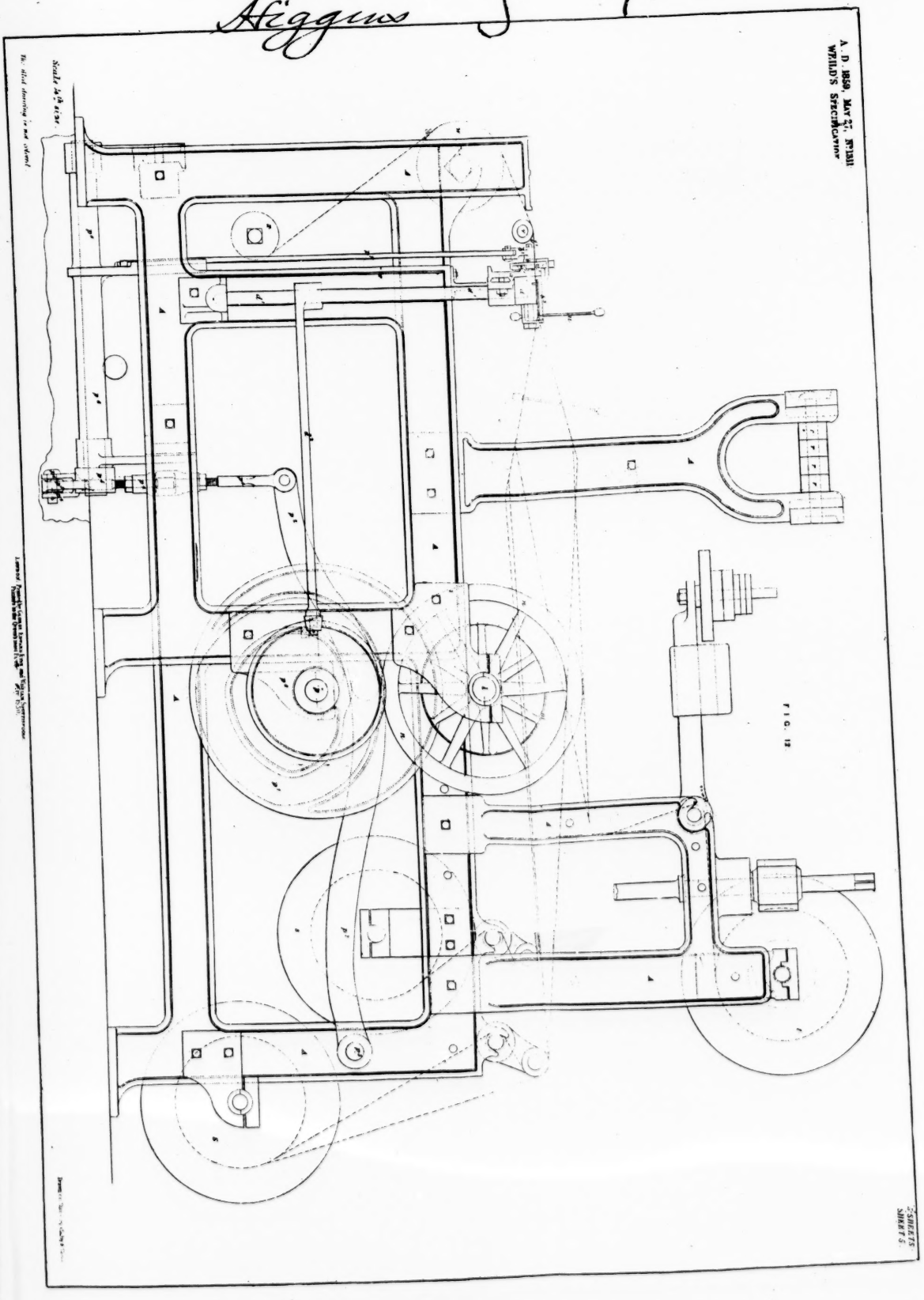
1795½

15 SHEETS
SHEET 4



A. D. 1858 May 27. N° 1311.
WELD'S Specification

Webster Loom Co. } page 796.
v.
Higgins



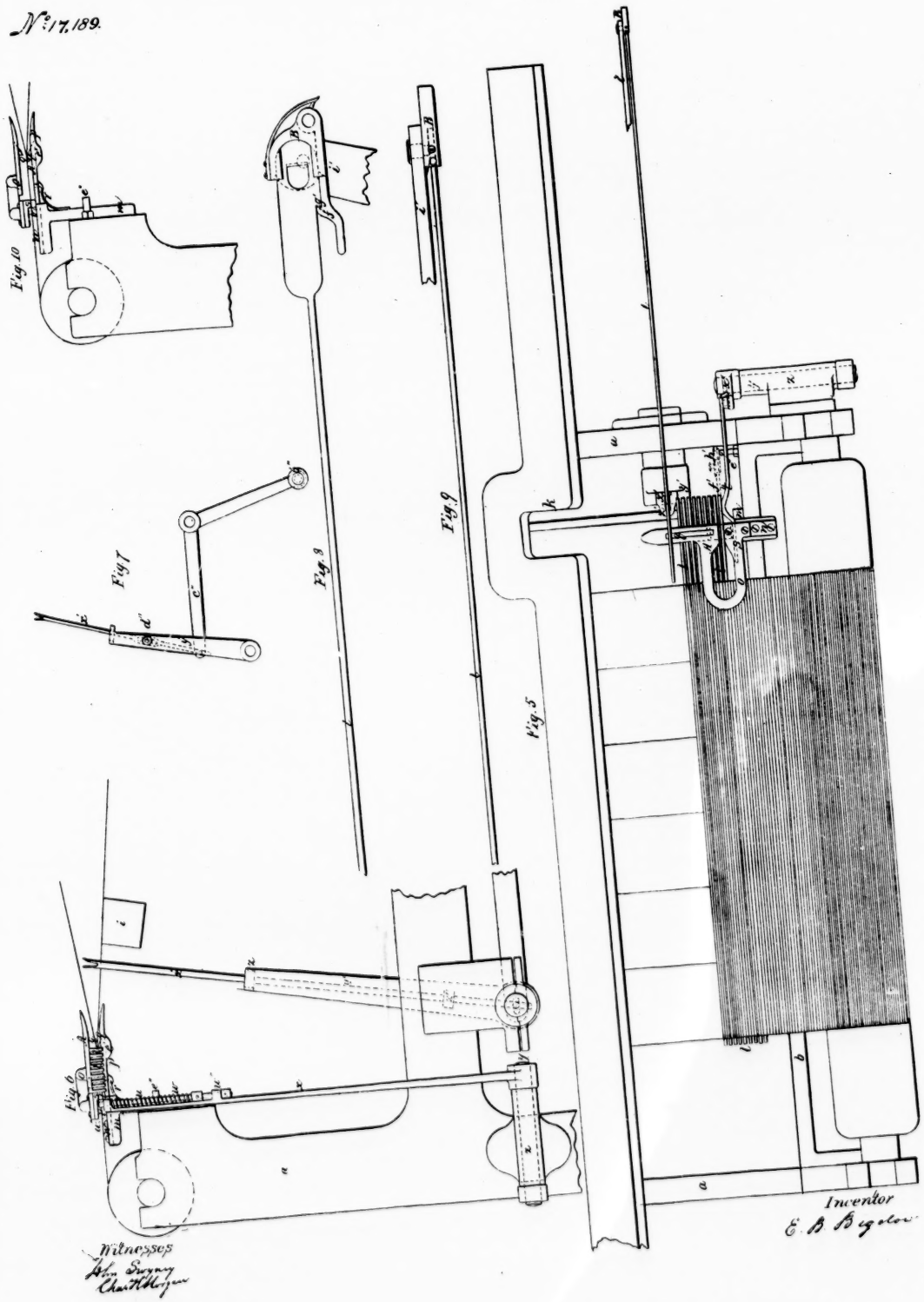
No. 267
Webster Loom Co.
v.
Higgins

Page 812.
E. B. Bigelow.
Weaving Pile Fabric.

Sheets 3 Sheets.

Patented May 5, 1857.

No. 17,189.



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Webster Loom Co.
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page 811

Sheet 2 - 3 Sheets

E. B. Bigelow.

Weaving Pile Fabric.

No. 17,189.

Patented May 5, 1857.

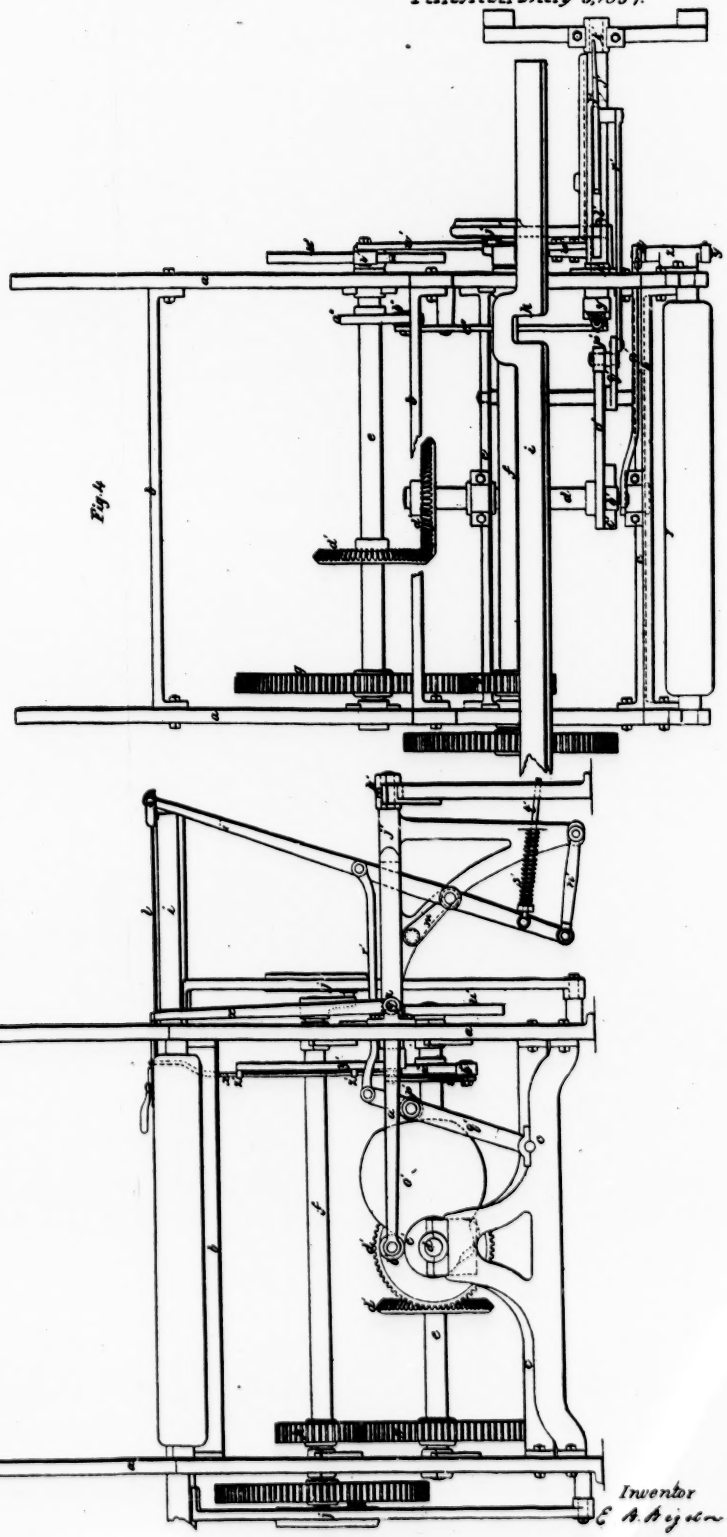

Fig. 4

Fig. 3

Witnesses

Inventor
E. B. Bigelow

No. 267
Webster Loom Co.
v.
Higgins

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Sheet 1 - 3 Sheets.

E. B. Bigelow.

Wearing Pile Fabric.

No. 17,189. Patented May 5, 1857.

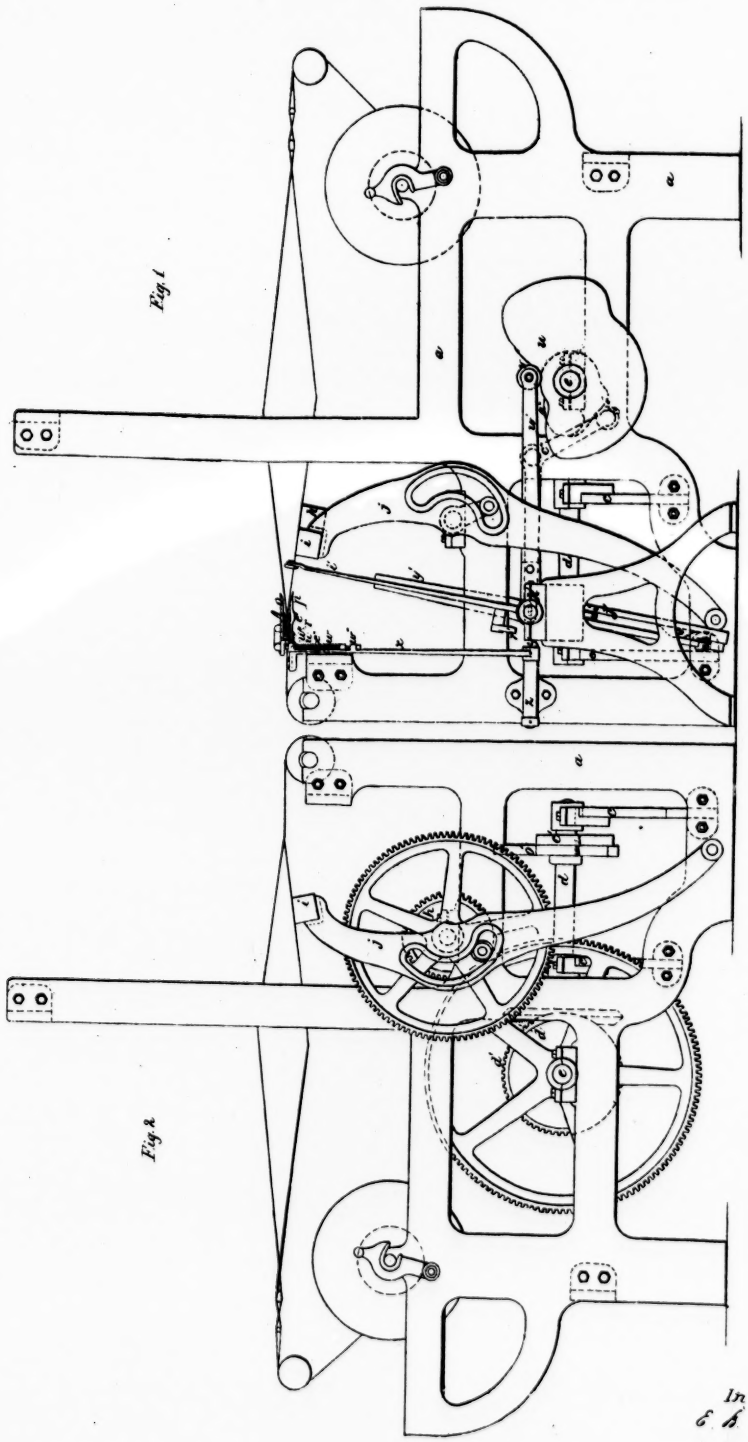


Fig. 1

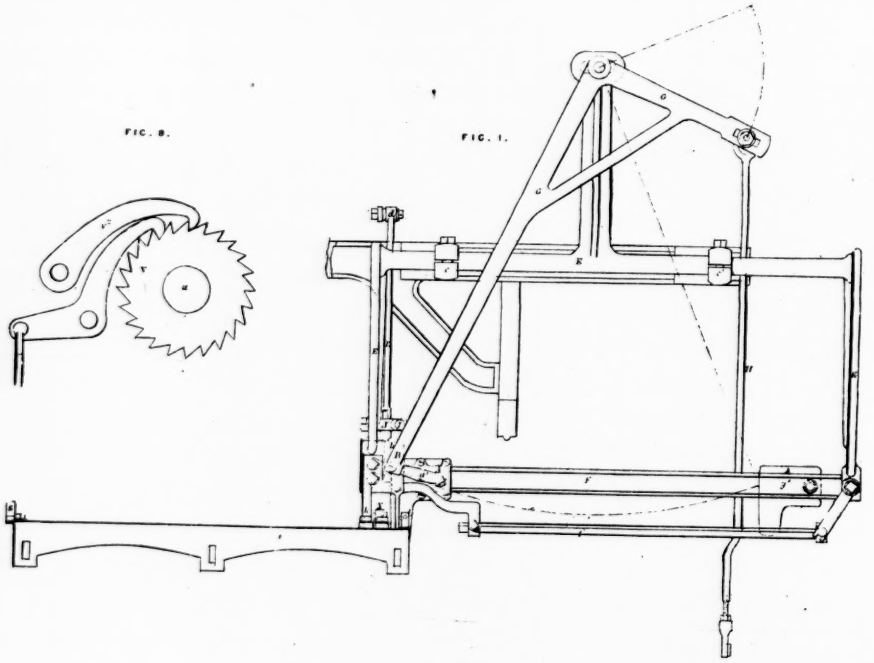
Fig. 2

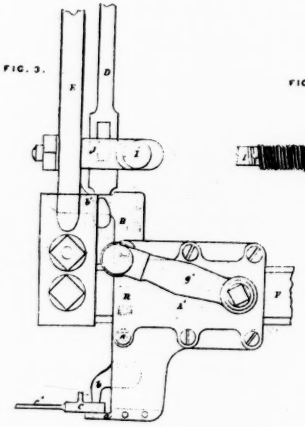
Witnesses
John Sargent
Chas. Wright

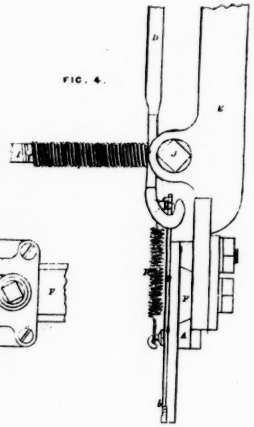
Inventor
E. B. Bigelow

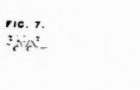
A.D. 1850. JULY 29. N° 13238.
BIRKBECK'S SPECIFICATION.

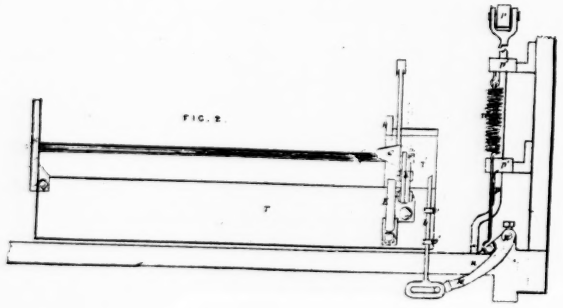
1 SHEET

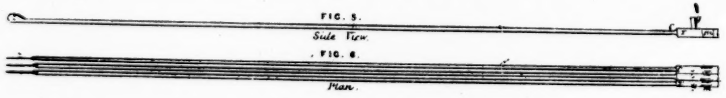


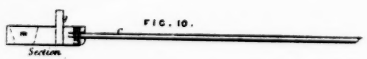


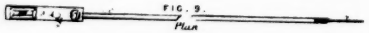


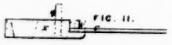


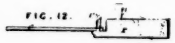












To filed drawing in parts Mould

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Walker Loom Co
v.
Birkbeck